

Spring 2004

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Bernard E. Harcourt

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Recommended Citation

Bernard E. Harcourt, Foreword: You Are Entering a Gay and Lesbian Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers - [Raising Questions about Lawrence, Sex Wars, and the Criminal Law], 94 J. Crim. L. & Criminology 503 (2003-2004)

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SUPREME COURT REVIEW

FOREWORD: "YOU ARE ENTERING A GAY AND LESBIAN FREE ZONE"¹: ON THE RADICAL DISSENTS OF JUSTICE SCALIA AND OTHER (POST-) QUEERS.

[RAISING QUESTIONS ABOUT *LAWRENCE*, SEX WARS, AND THE CRIMINAL LAW]

BERNARD E. HARCOURT*

The most renowned substantive criminal law decision of the October 2002 Term, *Lawrence v. Texas*,² will go down in history as a critical turning point in criminal law debates over the proper scope of the penal sanction. For the first time in the history of American criminal law, the United States Supreme Court has declared that a supermajoritarian moral belief does not necessarily provide a rational basis for criminalizing conventionally deviant conduct.³ The Court's ruling is the *coup de grâce* to legal moralism

* Professor of Law, University of Chicago. Special thanks to Mary Anne Case, Joshua Cohen, Elizabeth Emens, Janet Halley, Martha Nussbaum, Toni Massaro, Richard Posner, Mia Ruyter, James Spindler, Geoffrey Stone, and Cass Sunstein for comments, criticism, and guidance; and to Ranjit Hakim, Kate Levine, and Aaron Simowitz for exceptional research assistance.

¹ 1991 editorial by Johnny Noxema and Rex Boy in the Toronto zine *BIMBOX*, quoted in Dennis Cooper, *Queercore*, in *THE MATERIAL QUEER: A LESBIAN GAY CULTURAL STUDIES READER* 292 (Donald Morton ed., 1996) [hereinafter *THE MATERIAL QUEER*].

² 123 S. Ct. 2472 (2003) (upholding a substantive due process challenge to Texas's criminal statute banning homosexual "deviate sexual intercourse," TEX. PENAL CODE ANN. § 21.06(a) (2003), where "deviate sexual intercourse" is defined as oral sex, anal sex, or penetration with an object of the genitals or the anus of another person. TEX. PENAL CODE ANN. § 21.01(1) (2003)).

³ I use these terms—"supermajoritarian" and "conventionally deviant conduct"—in a positivist sense. According to a survey poll based on telephone interviews with 1000 adult Texans conducted between August 7 and August 21, 2003, by the Scripps Howard polling

administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations.⁴ Henceforth—or at least until further notice—majoritarian morality no longer automatically trumps liberal argument (whether consequentialist or deontological) in defining the reasonable and permissible contours of the penal code. Justice Byron White's infamous declaration in *Bowers v. Hardwick* that the criminal law is constantly, and may properly be, "based on notions of morality"⁵ no longer stands. Instead, Justice John Paul Stevens's contrary statement from his dissent in *Bowers* is elevated, in block quote, to supreme law of the land: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."⁶ With much pomp and circumstance, the majority in *Lawrence* inters legal moralism and crowns liberal legalism.⁷ As a matter of federal due process, courts reviewing penal legislation must now deploy *some other principle* to distinguish between permissible and impermissible majoritarian moral opprobrium.

agency, on behalf of the *Star-Telegram* and other media organizations, seventy percent of Texan respondents believed that homosexual behavior was morally wrong, compared to seventeen percent who felt that it was not morally improper. See Dave Montgomery, *Most Texans Say Gay Marriages are Wrong*, STAR-TELEGRAM, Sept. 5, 2003, available at <http://www.dfw.com/mld/dfw/news/nation/6698373.htm>. In addition, a similar poll conducted in Texas in 1999 showed a breakdown of sixty-eight percent morally opposed versus eighteen percent not morally opposed. See *id.* Moreover, male homosexual anal intercourse—the specific conduct charged in *Lawrence*—traditionally has been viewed as conventionally deviant in Texas and under common law. In 1868, most state penal codes, including the Texas criminal code, criminalized the "crime against nature" and "followed the English decisions defining the crime as involving penetration by a male penis inside the rectum of an animal, a woman or girl, or another man or a boy." Brief of Amici Curiae Cato Institute at 9, *Lawrence* (No. 02-102).

⁴ The leading variation in the criminal law is, naturally, the harm principle. For a discussion tracing the rise and triumph of the harm principle in criminal law, see generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999) (tracing the rise of the harm principle and suggesting that the triumph of the harm principle over legal moralism paradoxically has eviscerated the limiting principle of harm). See also BERNARD E. HARCOURT, *ILLUSION OF ORDER* (2001).

⁵ 478 U.S. 186, 196 (1986).

⁶ *Lawrence*, 123 S. Ct. at 2483 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

⁷ The pomp and circumstance resonates loudly in the majority's pronouncement following the block quote from Justice Stevens's *Bowers* dissent. With all the formality appropriate to the coronation of a new monarch following a *coup d'état*, the court declares: "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Id.* at 2484.

What that other principle will consist of is not clear. Justice Anthony Kennedy's opinion for the majority in *Lawrence* offers a dizzying array of possibilities, ranging from the watered-down harm principle of the American Law Institute's Model Penal Code, to evolving standards of morality as reflected in the history of state legislative enactments (and repeal) of sodomy provisions, to the critical commentary of reputedly conservative American academic judges such as Charles Fried and Richard Posner, to international law decisions of the European Court of Human Rights, to the 1957 British Wolfenden Report of the Committee on Homosexual Offenses and Prostitution, to the *Romer v. Evans* equal protection anti-animosity principle, to state judicial resistance to the *Bowers* ruling, to conceptions of privacy, notions of dignity, or what Cass Sunstein refers to as "an American version of desuetude."⁸ The result is a rhetorical smorgasbord of legal authority, a judicial *mélange* of bibliographic references. As Mary Anne Case observes, the *Lawrence* opinion points to a "this" and "that" of ambiguous referents—it is, in Case's words, an opinion that "starts its readers off with this and in the end may deliver that instead."⁹

Justice Kennedy's pastiche in *Lawrence* is, at a legal theoretical level, incoherent, and under normal circumstances—in many other cases—would be internally contradictory. As a jurisprudential matter, utilitarian welfare maximizing or harm calculations are anathema to a deontological human rights paradigm, which in turn is in tension with jurisdictional bean-counting. These different rules of decision have little in common except, of course, when they converge on the same result, which is apparently the case here—or at least, it is the case for decriminalizing homosexual sodomy. The theoretical incoherence and rhetorical overkill of Justice Kennedy's opinion lends credence to Justice Antonin Scalia's incendiary dissent in *Lawrence*, specifically to the idea that the majority's holding is no technical knock-out victory for liberal legalism, but rather a politically or culturally partisan decision.

To Justice Scalia, the majority in *Lawrence* simply took sides in our contemporary culture wars over the sexual and moral fabric of American society. The *Lawrence* ruling, Justice Scalia declares, is a partisan outcome that aligns the court with the pro-gay faction in large part because of a law profession that is biased in favor of gay men and lesbian women. "It is

⁸ Cass Sunstein argues on grounds of judicial prudence for a narrow reading of *Lawrence* that stresses this last possibility—the idea that "a criminal ban on sodomy is hopelessly out of accord with contemporary convictions." See Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2004 SUP. CT. REV. (forthcoming 2004).

⁹ See Mary Anne Case, *On 'This' and 'That' in Lawrence v. Texas*, 2004 SUP. CT. REV. (forthcoming 2004).

clear from this [decision] that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed," Justice Scalia writes.¹⁰ "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda"¹¹ These are fighting words—a battle cry, a call to arms in our contemporary culture wars—and according to the Associated Press, Justice Scalia has continued to wage war outside the courthouse. Several months after the *Lawrence* decision, Justice Scalia reportedly ridiculed the majority's ruling in a speech to the Intercollegiate Studies Institute, reading from Justice Kennedy's opinion with "a mocking tone," and deriding the majority for imposing, in his words, "the latest academic understanding of liberal political theory."¹²

Despite the vitriolic tone, Justice Scalia's dissent is remarkably insightful—in certain respects prescient—in situating the *Lawrence* decision in its proper social and political context, and it offers a useful heuristic to help interpret the result. The fact is, there is today a war of sexual projects that is being fought on American soil, and the federal courts, including the United States Supreme Court, are inextricably caught up in the ongoing battles. But what is missing in Justice Scalia's critique are the important nuances and subtleties that shape these contemporary sex wars, that make them so fascinating and so unpredictable—and that both resignify and ambiguate the purported gay victory in *Lawrence*.

The heart of the problem is that Justice Scalia incorrectly models our contemporary culture wars on two-sided military conflict—specifically on a war between, on the one hand, liberal homosexual activists who are promoting a pro-gay-rights agenda and the law profession with its "anti-anti-homosexual culture," and, on the other hand, mainstream anti-homosexual attitudes represented by those "[m]any Americans [who] do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."¹³ This two-party model does not—and cannot—begin to capture the complex social, political, and sexual dynamics of our contemporary sex wars. While it is true, of course, that

¹⁰ *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

¹¹ *Id.* at 2496 (Scalia, J., dissenting). Scalia defines the "homosexual agenda" as "the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." *Id.* (Scalia, J., dissenting).

¹² *Scalia Ridicules Court's Gay Sex Ruling*, USA TODAY, Oct. 23, 2003, available at http://abcnews.go.com/wire/Politics/ap20031023_2301.html.

¹³ *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

everyone, if pushed to the limit, is either “for” or “against” the legalization of homosexual relations—just as everyone, again if pushed to the limit, is either “for” or “against” abortion, “for” or “against” the death penalty, “for” or “against” gun control—it is necessary to focus not simply on the ultimate polarity but rather on the much wider range of sexual projects in order to begin to understand the unexpected alliances, unanticipated tipping points, and surprising truces that characterize our sex wars. Instead of two-sided military conflict, the model should approximate more fluid and shifting patterns of temporary equilibria in a continually interrupted, jarred, and hence moving medium.

Our present sexual landscape in the United States—and in the West more generally—is marked by a multiplicity of sexual projects, at times ambiguous and fluid, at other times rigid, doctrinaire, even fascistic; sometimes overlapping or allied, at other times in tense conflict; some militant and hard, others nurturing, warm, even embracing; some exclusionary, some missionary. The battle lines are drawn not only over the sex of sexual partners—that’s the least of it—but over multiple dimensions of promiscuity, monogamy,¹⁴ child custody, sadomasochism, commitment, “fisting,”¹⁵ public sex, female-to-male sex change operations (and male-to-female), “barebacking” and “bug chasing,”¹⁶ importuning, “role-playing,”¹⁷ “piercing” and “cutting,” “packing,”¹⁸ “fancying,”¹⁹ marrying, childbearing, adopting, pornography, and sexual assault—to name just a few. The very definitions of heterosexual, homosexual, bi-, trans-, poly-, metro-, pomo-sexual, lesbian, queer—again, to name just a few—are fought over,²⁰ even whether the labels themselves should be

¹⁴ See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2004).

¹⁵ The practice of inserting a fist and forearm into the anus or vagina.

¹⁶ The practice among some men of engaging in unprotected same-gender anal sex or of actively seeking to be infected with the HIV virus. See *infra* text accompanying notes 115-17.

¹⁷ For example, the femme/butch debates among lesbian women.

¹⁸ The practice among some women of “the wearing of a dildo down the trouser leg to suggest the existence of a penis.” SHEILA JEFFREYS, UNPACKING QUEER POLITICS 1 (2003) [hereinafter JEFFREYS, UNPACKING QUEER POLITICS].

¹⁹ “Fancying” is “attraction based simply on physical appearance” and triggered significant debate as to whether it is objectifying, racist, “ableist,” and reflects “a construction of sexuality which was hostile to women’s interests.” SHEILA JEFFREYS, THE LESBIAN HERESY: A FEMINIST PERSPECTIVE ON THE LESBIAN SEXUAL REVOLUTION, at xii (1993) [hereinafter JEFFREYS, THE LESBIAN HERESY].

²⁰ Not to mention “post-queer” (referring to younger more radical queers who are positioning themselves in opposition to assimilationist queer politics) and “breeder” (referring to heterosexuals with children, and meant to connote that the child-bearing and

abandoned. The academy, the courts, the media and public sphere have witnessed an explosion of sexual projects and related discourses of sexuality.

If a male worker on an all-man oil rig is held down by his fellow guy workers while they deliberately put their penises up against his body, if he is threatened with same-sex rape, is he the victim of sexual harassment under Title VII, as Justice Scalia writing for a unanimous court makes possible in *Oncale v. Sundowner Offshore Services, Inc.*,²¹ or should the lower federal court reread the factual allegations in a manner that ambiguates sexual desire, as Janet Halley, professor at Harvard Law School, ingeniously and provocatively suggests in *Sexuality Harassment*?²² Could it be, as Halley writes, that the alleged victim in *Oncale* “performs a feminine man to signal his willingness to be mastered,” that “the other guys comply with a big display of masculinity,” so that “‘man fucks woman’ but with a twist that undoes the capacity of the male/female model to underwrite [the plaintiff *Oncale*] as a victim”?²³ Could it be, as Halley suggests, that in reality it is the plaintiff alleging sexual harassment who may be attacking his fellow guy workers “by invoking the remarkable powers of the federal court to restore his social position as heterosexual”?²⁴ And would we really want the average juror or Justice Scalia using their common sense to resolve these questions? (For the skeptical or unaccustomed reader, try mapping this on the rape allegations of the concierge of the Lodge & Spa at Cordillera Colorado against NBA superstar Kobe Bryant, and keep in mind that, shortly before Bryant’s appearance in court, a *USA Today*/CNN/Gallup poll revealed that forty-one percent of white respondents and sixty-eight percent of African American respondents believed her allegations probably untrue).²⁵ Notice in the debate over *Oncale* how a gay-friendly judicial opinion that has the potential of protecting gay men and lesbians from same-sex sexual harassment, a decision supported by the liberal pro-gay-rights forces,²⁶ a

child-raising capabilities of heterosexuals are privileged over those of homosexual couples). See CHERRY SMYTH, *LESBIANS TALK QUEER NOTIONS* 57 (1992).

²¹ 523 U.S. 75 (1998). In *Oncale*, the Court held that this may amount to sex discrimination under Title VII on a theory of same-sex sexual harassment. *Id.* at 75.

²² Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE* 80 (Wendy Brown & Janet Halley eds., 2002).

²³ *Id.* at 95.

²⁴ *Id.* at 97.

²⁵ See Jeffrey Toobin, *The Consent Defense*, *NEW YORKER*, Sept. 1, 2003, at 40, 87.

²⁶ Of course, even within the liberal pro-gay-rights position, there was and is still debate about whether the extension of sexual harassment law to same-sex harassment is strategically positive.

ruling that promotes the “so-called homosexual agenda” and that is authored, ironically, by Justice Scalia himself, is attacked as potentially encroaching on same-gender sexual advances and sexuality more generally from a gay-friendly theoretic perspective that challenges the homosexual (as well as heterosexual) identity.²⁷

If four men nail the heads of their penises to a butcher block with stainless steel needles while being photographed by an editor of a gay newsmagazine, *The Advocate*, are they manifesting an unhealthy psychotic internalization of their oppression as homosexual men, as Sheila Jeffreys, professor of political science at the University of Melbourne, suggests,²⁸ or are they instead performing a valuable and cathartic gay male initiation ritual that helps overcome the stigma of unmanliness associated with gay male sex?²⁹ Are they, in the words of Jeffreys, “act[ing] out upon their bodies the woman-hating and gay-hating of the societies they inhabit”?³⁰ Or are similar acts of sadomasochism, instead, as Leo Bersani reports, “passionate, erotic, growthful, consensual, sometimes fearful, exorcism, reclamation, joyful, intense, boundary-breaking, trust building, loving, unbelievably great sex, often funny, creative, spiritual, integrating, a development of inner power as strength.”³¹ Within the gay-friendly community—within the community of scholars and activists whose agenda is, in the words of Justice Scalia, “directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”³²—where do we look for an answer to this question? In gay male studies, in queer theory, in lesbian feminist writings? And is it really true, as Jeffreys contends, that “the political agenda of queer politics is damaging to the interests of lesbians, women in general, and to marginalized and vulnerable constituencies of gay men”?³³

If a male transvestite marries a male-to-female transsexual who has undergone sexual-reassignment surgery, is he entitled to an annulment of the marriage because his wife was a man and has refused to consummate the marriage?³⁴ Is homosexual public sex good or bad for gay politics? Is

²⁷ See Halley, *supra* note 22, at 82.

²⁸ JEFFREYS, UNPACKING QUEER POLITICS, *supra* note 18, at 102.

²⁹ See generally JOHN PRESTON, MY LIFE AS A PORNOGRAPHER AND OTHER INDECENT ACTS 17, 50, 59 (1993).

³⁰ JEFFREYS, UNPACKING QUEER POLITICS, *supra* note 18, at 102.

³¹ Leo Bersani, *Foucault, Freud, Fantasy and Power*, 2 GLQ: J. LESBIAN & GAY STUD. 11, 19-20 (1995).

³² *Lawrence v. Texas*, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting).

³³ JEFFREYS, UNPACKING QUEER POLITICS, *supra* note 18, at 2.

³⁴ This is the legal question in *Corbett v. Corbett*, a British case from 1970. See *Corbett v. Corbett*, 2 W.L.R. 1306 (P.D.A. 1970). The case is notorious and has received a lot of

John Rechy, author of *The Sexual Outlaw*, right when he argues that promiscuous gay males are "the shock troops of the sexual revolution," that the "streets are the battleground," that "the revolution is the sexhunt," and that "a radical statement is made each time a man has sex with another on a street"?³⁵ These types of questions—and the debates they engender—reflect a proliferation of sexual projects in contemporary Western culture that fractures Justice Scalia's simple two-sided military conflict model, undercuts the very coherence of an expression like "homosexual agenda" or "anti-homosexual agenda," and complexifies the symbolic meaning of a decision like *Lawrence*.

In order to properly understand *Lawrence*—and other sex and cultural wars—we need a much finer grained understanding of sexual projects and of the fragmentation of those projects. In the *Lawrence* litigation, the surprising coalitions, the telling alliances, the strange bedfellows were most clearly visible on the libertarian side—with amicus briefs filed in support of John Lawrence by Republican groups,³⁶ Baptist ministers and representatives of twenty-eight other religious organizations,³⁷ a conservative think-tank,³⁸ the American Bar Association,³⁹ the American Psychiatric and Psychological Associations,⁴⁰ and the National Organization of Women,⁴¹ in addition to the usual suspects, such as the

critical attention. See, e.g., Mary Coombs, *Transgenderism and Sexual Orientation: More Than a Marriage of Convenience?*, in QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 397, 400-03 (Mary Bernstein & Renate Reimann eds., 2001) [hereinafter QUEER FAMILIES, QUEER POLITICS]; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (discussing the *Corbett* case).

³⁵ JOHN RECHY, *THE SEXUAL OUTLAW* 299 (1979). For pro-public-sex arguments, see generally POLICING PUBLIC SEX (Dangerous Bedfellows ed., 1996); PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* (1994). For anti-public-sex arguments, see generally JEFFREYS, *UNPACKING QUEER POLITICS*, *supra* note 18, at 57-77.

³⁶ See Amici Curiae Brief of the Log Cabin Republicans and Liberty Education Forum in Support of Petitioners, *Lawrence* (No. 02-102); Brief of Amici Curiae Republican Unity Coalition and the Honorable Alan K. Simpson in Support of Petitioners, *Lawrence* (No. 02-102).

³⁷ See Brief of the Alliance of Baptists et al. as Amici Curiae in Support of Petitioners, *Lawrence* (No. 02-102).

³⁸ See Brief of Amici Curiae Cato Institute, *Lawrence* (No. 02-102).

³⁹ See Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Lawrence* (No. 02-102).

⁴⁰ See Brief for Amici Curiae American Psychological Association et al. in Support of Petitioners, *Lawrence* (No. 02-102).

⁴¹ See Brief of NOW Legal and Education Fund as Amicus Curiae in Support of Petitioners, *Lawrence* (No. 02-102).

American Civil Liberties Union (ACLU) and ACLU of Texas,⁴² Amnesty International,⁴³ and gay-rights organizations.⁴⁴ To be sure, the cornucopia of *amicus* briefs reflects strategy and lobbying on the part of John Lawrence's lawyers. But, more important, it reflects the kind of political coalition-formation that produced the result in *Lawrence*. The same kind of fragmented politics occur on both sides of sex wars on most issues—same-sex marriage, public sex, sadomasochism, for example. And it is what will account for the outcomes there too.

The ruling in *Lawrence* simply does not lend itself to facile, dichotomous interest-group political interpretation. The result in *Lawrence* does not symbolize primarily an endorsement of homosexuality or an embrace of a "homosexual agenda." What it reflects much more is a curious and fascinating alliance between liberal pro-gay-rights advocates, conservative social libertarians, Republican gay men and lesbian women, and pro-sex traditional liberal heterosexuals, among others. The loudest message that *Lawrence* conveys is: "what two consenting mature adults do in their own bedroom (as long as they are not hurting anyone) is none of the government's business." The symbolic message of *Lawrence* is not "We're on board with homosexuals," it sounds more of "We're against surveillance in adult bedrooms."

More important, the result in *Lawrence* is not unambiguously pro-gay. The fracturing of sexual projects in the West also means, paradoxically, that the *Lawrence* decision does not so simply or unambiguously advance the interests of all self-identified gay men, lesbian women, queers, liberal (pro-gay) heterosexuals, or others who are gay-friendly yet reject sexual labels. The problem is not just the potential backlash against gay men and lesbian women that may follow the *Lawrence* decision. The rub is that the proliferation of sexual projects makes it far too simplistic today to think about a decision such as *Lawrence* in dichotomous terms—as either "good" or "bad" for "homosexuals." Who wins and who loses depends on a much closer parsing of sexual projects. Justice Scalia is only partly right: the decision does favor the liberal pro-gay-rights position and in this sense is gay-friendly. But it may, possibly, ill-serve the interests of many others who oppose the dominance of what Judith Butler refers to as "the defining

⁴² See Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Texas in Support of Petitioner, *Lawrence* (No. 02-102).

⁴³ See Brief Amici Curiae of Amnesty International U.S.A. et al. in Support of Petitioners, *Lawrence* (No. 02-102).

⁴⁴ See Brief of the National Lesbian and Gay Law Association et al. as Amici Curiae in Support of Petitioners, *Lawrence* (No. 02-102).

institutions of phallogocentrism and compulsory heterosexuality.”⁴⁵ There may be more to be gained from resisting a criminal stigma where—or so long as, or on the condition that—criminal enforcement and accompanying punishments are in fact *de minimis*, than there is to be lost in the normalization of conventional deviance.

This Foreword probes the fragmentation of sexual projects in the West and its implications for the sex wars and the penal law. It is intended as a guide or manual for the interpretation of the result in *Lawrence* and future sex battles. Its goal is to help make sense of the dynamic interactions that give rise to a political resolution such as *Lawrence*. In this interpretive process, Justice Scalia’s incendiary dissent is perhaps the most helpful starting point. Justice Scalia in *Lawrence* has begun to put his finger on cultural conflict. This Foreword builds on Justice Scalia’s radical dissent to tap the real pulse of the sex wars. Part I focuses on the fracturing of sexual projects and demonstrates that it is, today, far too simplistic—in fact profoundly counterproductive—to describe the culture wars as a two-party conflict or to talk about a “homosexual agenda.” In the *Lawrence* litigation, this point was brought home in the surprising coalition opposing the Texas statute. The question this raises is, what kinds of fissures split the gay community? What would it sound like to argue from a gay-friendly perspective against the ruling in *Lawrence*? Part II explores this question and develops through a pastiche of radical statements a politics that embraces the marginal, even criminal desire to transgress for the sake of transgression, that thrives on rebellion against hegemonic legal regimes. With this in place, Part III reconstructs Justice Scalia’s radical dissent and sharpens it to produce a keener interpretive framework to understand the result in *Lawrence* and future sex wars. Justice Scalia is right that there is a culture war and that the courts are inextricably involved in those wars. He is also right that the court is shaped by the legal profession and that their decisions are largely shaped by the law profession culture. This culture—and the legal academy that reproduces it—are by and large more tolerant of homosexuality than other sectors of society, such as listeners of talk radio or leaders of organized religions, but also than other trade or professional networks, such as, most probably, police or corrections officers, electricians, or perhaps corporate executives. The decision in *Lawrence* is the product of this law profession culture, and, at least on the surface, is gay-friendly—it favors the interests of liberal pro-gay-rights advocates. But it does not necessarily promote the interests of all the gay-friendly. It is here that the Foreword probes *Lawrence*—dark side and all.

⁴⁵ See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY*, at ix (1990).

I.

Casually inspect a contemporary high school lunch room, a college or university campus, a youth clothing store. Open the pages of a staid alumni magazine. The sexual projects are, literally, all over the map—on both sides of the traditional divides. They are wide and varied—in fact, far more varied than a two-party model would suggest. This, from a cover feature on Professor Robert George, a highly distinguished and conservative professor of politics and jurisprudence at Princeton University, in the staid pages of the *Princeton Alumni Weekly*:

[According to Professor Robert George,] “Good” sex is genital sex between spouses, while “bad” (i.e., immoral) sex is defined as sex between unmarried partners, masturbation, or sex between spouses other than the genital-to-genital variety. He writes in *The Clash of Orthodoxies*, “The plain fact is that the genitals of men and women are reproductive organs all of the time—even during periods of sterility Insofar as the point or object of sexual intercourse is marital union, the partners achieve the desired unity (i.e., become ‘two-in-one-flesh’) precisely insofar as they mate . . . or, if you will, perform the type of act—the only type of act—upon which the gift of a child may supervene.”⁴⁶

George explains in greater detail in *The Clash of Orthodoxies* that “masturbatory and sodomitical acts, by their nature, instrumentalize the bodies of those choosing to engage in them in a way that cannot but damage their integrity as persons.”⁴⁷ This accounts, George contends, for the “self-alienating and dis-integrating qualities of masturbatory and sodomitical sex.”⁴⁸

Contrast George—specifically on the question of homosexual sodomy—with Judge Richard Posner. Posner’s sexual project is to treat sex from a morally indifferent, purely economic perspective.⁴⁹ Posner views the homosexual life as an unhappier one than the heterosexual, and for this reason does not wish homosexuality on anyone. Yet he favors decriminalization. His argument takes three steps. First, approximately 2.5 percent of the American population is predominantly or exclusively

⁴⁶ J. I. Merritt, *Heretic in the Temple: Robby George Once Worked for George McGovern; Now He’s the Hero of the Intellectual Right*, PRINCETON ALUMNI WKLY., Oct. 8, 2003, available at <http://www.princeton.edu/~paw>.

⁴⁷ ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* 269 (2001).

⁴⁸ *Id.* at 79.

⁴⁹ Posner develops in his work, *Sex and Reason*, an economic theory of sexuality that, as a descriptive matter, embraces a rational choice perspective on sexual behavior and, from a normative perspective, adopts a libertarian position on sexual regulation—“not to be confused,” Posner emphasizes, “with either libertine or modern liberal.” RICHARD POSNER, *SEX AND REASON* 3 (1992).

homosexual and thus legal discrimination imposes a significant aggregate cost.⁵⁰ Second, homosexual orientation is more innate than chosen and thus decriminalization is unlikely to increase the number of homosexuals.⁵¹ Third, the homosexual has a less happy life than the heterosexual—stemming primarily from the biological difficulties associated with childbearing and the resulting disruption of family life—and there is no reason to add to their misery.⁵² Posner writes:

If I am correct that even in a tolerant society the male homosexual's lot is likely to be a less happy one on average than that of his heterosexual counterpart, still this is no reason in itself to strew legal or other social obstacles in the path of the homosexual. On the contrary, *in itself* it is a reason to remove those obstacles in order to alleviate gratuitous suffering. It becomes a reason for repression only if repression can change homosexual preference, incipient or settled, into heterosexual preference at acceptable cost and thereby make persons who would otherwise become or remain homosexuals happier. There is no reason to think that repression, psychotherapy, behavior modification, or any other technique of law or medicine can do so in a large enough number of cases to warrant the costs, not least to the "unconverted" homosexual, that legal and social discrimination imposes.⁵³

Posner concludes that "the sodomy laws ought to be repealed."⁵⁴ Though Posner agrees with the result in *Lawrence*, he deplores the majority's reasoning. The homosexual sodomy laws are rarely enforced and do little harm, he emphasizes.⁵⁵ Although the country may not have been ready for a pro-gay decision in 1986 at the time of *Bowers v. Hardwick*, Posner believes that, by 2003, seventeen years later, "the climate of opinion had

⁵⁰ *Id.* at 294-95.

⁵¹ *Id.* at 295-99. In Posner's words, "the removal of the legal disabilities of homosexuality is unlikely to increase the amount of homosexual preference." *Id.* at 311.

⁵² See generally *id.* at 301-09. Posner claims that, even without legal disabilities, homosexuals are less happy. See *id.* at 303 ("It is unlikely that when every legal disability of homosexuality has been dismantled and every heterosexual has been thoroughly schooled in tolerance, the homosexual life-style will cease to be a distinctive and, to a significant degree, an unhappy one."). Childbearing and family stability are key considerations, see *id.* at 306, but so are others, such as artistic and therefore neurotic proclivities. See *id.* at 304.

[H]omosexuals will cluster in the artistic and decorative occupations even after tolerance for homosexuality becomes general throughout society. If so, we can also expect, all other considerations to one side, the average homosexual even in a completely tolerant society to be somewhat more neurotic than the average person, for neurosis is the occupational hazard of artistic people.

Id.

⁵³ *Id.* at 307-08.

⁵⁴ *Id.* at 311.

⁵⁵ Richard Posner, Comments at the Workshop on Law and Philosophy, University of Chicago Law School (Sept. 29, 2003). Regarding the lack of enforcement, see POSNER, *supra* note 49, at 309-11.

changed sufficiently that the court could get away with invalidating the sodomy laws as underenforced, irrational, and a gratuitous insult to homosexuals."⁵⁶

Where does Posner, who does not wish homosexuality on anyone, yet supports the result in *Lawrence*, fit in Scalia's two-party model? How about the Cato Institute, a conservative or classical liberal or libertarian or market liberal think tank—notice the identity problems here too⁵⁷—which retained William Eskridge, professor at Yale Law School and author of one of the leading liberal pro-gay-rights texts, as counsel of record for its intervention in the *Lawrence* litigation?⁵⁸ How about the many self-identified conservatives who think homosexuality is immoral and who clearly "do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home,"⁵⁹ yet who support the *Lawrence* decision? As one of these many self-identified conservatives writes on www.intellectualconservative.com:

Of course most of the displeasure among Conservatives over the Supreme Court ruling stems from our belief that Homosexuality is abnormal and morally wrong. And yes it is wrong; it is sinful, and I strongly believe it is abnormal. Yet when it occurs between two, or three, or more consenting adults, in the privacy of their homes it is not my business. It is not your business. And certainly none of the government's business.⁶⁰

⁵⁶ Correspondence from Richard Posner to author (Jan. 28, 2004) (on file with author).

⁵⁷ How to properly characterize the Cato Institute is itself an impossible task. The proper way would be conservative but not conservative, liberal but not liberal, classical liberal, libertarian, pro-enterprise, free market, or market liberal. The Cato Institute has a fascinating discussion of its own philosophical orientation on its web site—concluding that the Institute has:

a cosmopolitan, inclusive vision for society. We reject the bashing of gays, Japan, rich people, and immigrants that contemporary liberals and conservatives seem to think addresses society's problems. We applaud the liberation of blacks and women from the statist restrictions that for so long kept them out of the economic mainstream. Our greatest challenge today is to extend the promise of political freedom and economic opportunity to those who are still denied it, in our own country and around the world.

Cato Institute, *About Cato*, at <http://www.cato.org/about/about.html> (last visited Feb. 24, 2004).

⁵⁸ WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

⁵⁹ *Lawrence v. Texas*, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting).

⁶⁰ Doug Hagin, *Supreme Court Right in Lawrence v. Texas*, at <http://www.intellectualconservative.com/article2476.html> (July 18, 2003); see also, e.g., Brian S. Wise, *The Supreme Court: Unlocked Doors and Whitey*, at <http://www.intellectualconservative.com/article2034.html> (Dec. 6, 2002) (stating that "[t]o suggest the same adults who are presumably capable of making these decisions cannot

The fact is, there are a lot of people who do not want homosexuals around them, yet who do not support the criminalization of homosexual sodomy. Where do we place their sexual projects?

What about "metrosexuals," whose sexual project is ambiguously parasitic on the marginalization and taboo of homosexuality? "Metrosexuals" refer somewhat imprecisely to generally heterosexual practicing males—sometimes hyper-heterosexual—who share aesthetic sensibilities with the more traditional stereotype of the gay male.⁶¹ This definition of metrosexual is sketchy precisely because the thrust of the metrosexual identity—like so many others today—is to ambiguate sexuality. According to William Safire of *The New York Times*, quoting Mark Simpson who coined the term, "[h]e might be officially gay, straight or bisexual, but this is utterly immaterial, because he has clearly taken himself as his own love object and pleasure as his sexual preference."⁶² (The iconic figure of the metrosexual is the British soccer superstar, David Beckham, who reportedly wears nail polish, sports designer clothes, braids his hair, poses for gay magazines, and has a well-publicized hyper-heterosexual relationship with a member of the Spice Girls).⁶³ In seeking to

decide rationally on the matter of oral and/or anal sex, and must therefore be overseen by law (no matter how generally unenforceable) is ludicrous").

⁶¹ For general descriptions of the new term, see Penelope Green, *Books of Style: For Men From Venus*, N.Y. TIMES, Oct. 19, 2003, § 9 (Magazine) at 11 (reviewing MICHAEL FLOCKER, *THE METROSEXUAL GUIDE TO STYLE: A HANDBOOK FOR THE MODERN MAN* (2003)); Tom McGeeveran, *Shmomo Erectus*, N.Y. OBSERVER, Aug. 18, 2003, at 1; Joan Ryan, *Is New Governor a Dandy? Schwarzenegger Macho But Coiffed*, S.F. CHRON., Nov. 18, 2003, at A21; William Safire, *Metrosexual*, N.Y. TIMES, Dec. 7, 2003, § 6 (Magazine) at 30; Warren St. John, *Metrosexuals Come Out*, N.Y. TIMES, June 22, 2003, § 9 (Magazine) at 1; David Von Drehle, *GOP Leans on CBS to Shield Reagan Legacy*, WASH. POST, Nov. 2, 2003, at A5. The term "metrosexual" originated in 1994 initially, ironically, in an attempt to make fun of marketers. According to William Safire, Mark Simpson used the term first in an article in the British paper *The Independent* to mock the effort by marketers and advertisers to create a sensitive male image in order to push their products. See generally Safire, *supra*; St. John, *supra*.

⁶² See Safire, *supra* note 61, at 30 (quoting Mark Simpson). Under most versions, though, the metrosexual is identified as straight and has, as his foil, the unreconstructed straight male. He is, in a sense, the straight male who emerges after a session with the gay guys on "Queer Eye for the Straight Guy." See generally McGeeveran, *supra* note 61; St. John, *supra* note 61.

⁶³ Safire, *supra* note 61, at 30; St. John, *supra* note 61, at 5. Here are some definitions: "a straight urban male with enough feminine affinities, like a knowledge of hair products and how to use them, to make him attractive to both sexes—and to just about every marketer on the planet," Green, *supra* note 61, at 11; "the straight, urban man who is well-groomed, well-dressed and perfectly at home at the cosmetics counter at Saks. He cares deeply about the width of his lapels and the crease in his slacks. He trims his nose hair religiously," Ryan, *supra* note 61, at A21; "straight urban men willing, even eager, to embrace their feminine sides," St. John, *supra* note 61, at 1; "men who love fabric swatches and manicures even

ambiguous sexuality, the metrosexual is not only *not* afraid of being called or perceived as homosexual,⁶⁴ he thrives off the taboo that contributes to the mystique of being gay. Cultural critics have made the analogy to the way that “white suburban teenagers have long cribbed from hip-hop culture, as a way of distinguishing themselves from the pack.”⁶⁵ It is the criminalization of drugs and guns, and the marginalization of black rap culture that makes hip hop, in part, attractive to white suburban youths. The metrosexual too flirts with the danger of outlaw status. Where then do we fit the “metrosexual” in a two-party model?

At the other end of the political spectrum, how do we categorize the radical anti-assimilationist queer activists who embrace a marginalized status? How about the “lesbian outlaw” whose “status as outlaw is, for many lesbians, one important source of the satisfaction to be gained from lesbianism”?⁶⁶ What about the homosexual public-sex activist “living fully at the very edge, triumphant over the threats, repression, persecution, prosecution, attacks, denunciations, hatred that have tried powerfully to crush him from the beginning of ‘civilization’”?⁶⁷ What about Gay Shame, a queer activist group based in San Francisco whose web motto is “Don’t be devoured by the consumerist monster of ‘Gay Pride’—Stop the monster of assimilation, before it’s too late.”⁶⁸ Listen carefully to how Gay Shame describes itself:

GAY SHAME IS THE VIRUS IN THE SYSTEM. We are a radical alternative to the gay mainstream and the increasingly complacent left. We seek nothing less than a new queer activism that addresses issues of race, class, gender, and sexuality to counter the self-serving ‘values’ of the gay mainstream. We are dedicated to fighting the rabid assimilationist monster of corporate gay ‘culture’ with a devastating

though they are straight,” Von Drehle, *supra* note 61, at A5. Other somewhat synonymous terms include “PoMosexual,” “just gay enough,” and “flaming heterosexuals.” St. John, *supra* note 61, at 5. Note, it is also a term, according to *The Washington Post*, that “[h]as gone from coinage to eye-rolling overuse faster than any word in the history of English”—though this may reflect, more than anything, envy of *The New York Times*, which in the *Post*’s words is the “leading chronicle of metrosexuality.” Von Drehle, *supra* note 61, at A5.

⁶⁴ As one self-identified metrosexual explains to *The New York Times*, “It doesn’t bother me at all. Call it homosexual, feminine, hip, not hip—I don’t care. I like drawing from all sorts of sources to create my own persona.” St. John, *supra* note 61, at 5. According to the *Times*, “Having others question their sexuality is all part of the game.” *Id.* Another critic explains: “Wanting them to wonder and having them wonder is a wonderful thing. It gives you an air of mystery: could he be? It makes you stand out.” *Id.*

⁶⁵ *Id.*

⁶⁶ JEFFREYS, THE LESBIAN HERESY, *supra* note 19, at 99.

⁶⁷ RECHY, *supra* note 35, at 299.

⁶⁸ Gay Shame, Home Page, at <http://www.gayshamesf.org/index.html> (last visited Feb. 25, 2004).

mobilization of queer brilliance. Gay Shame is a celebration of resistance: all are welcome.⁶⁹

Under the rubric "Queercore," other radicals draw the line even more sharply. Queercore refers to "the punky, anti-assimilationist, transgressive movement on the fringe of lesbian and gay culture."⁷⁰ It has produced a number of "zines"—e.g. "personal little xeroxed rags," "a kind of popular press"⁷¹—and has annual conventions that are far from conventional, even by queer terms. This, from a 1991 editorial by Johnny Noxema and Rex Boy, the editors of the Toronto zine *BIMBOX*:

You are entering a gay and lesbian-free zone. . . . Effective immediately, BIMBOX is at war against lesbians and gays. A war in which modern queer boys and queer girls are united against the prehistoric thinking and demented self-serving politics of the above-mentioned scum. BIMBOX hereby renounces its past use of the term lesbian and/or gay in a positive manner. This is a civil war against the ultimate evil, and consequently we must identify us and them in no uncertain terms. . . . So, dear lesbian woman or gay man to whom perhaps BIMBOX has been inappropriately posted . . . prepare to pay dearly for the way you and your kind have fucked things up.⁷²

The internal critique of gay culture is vitriolic. It verges on the violent—at least, verbally—as evidenced by this other pronouncement in *BIMBOX*: "We will not tolerate any form of lesbian and gay philosophy. We will not tolerate their voluntary assimilation into heterosexual culture. . . . [I]f we see lesbians and gays being assaulted on the streets, we will not intervene, we will join in. . . . Effective immediately, [we are] at war with lesbians and gays."⁷³ This does sound like a culture war, but surely it defies a two-party model.

What about "queer punk," a new music trend that cultivates anti-assimilation?⁷⁴ These bands, with names like The Skin Jobs and The Rotten Fruits, are out to turn the queer left upside down. They "tear our

⁶⁹ Gay Shame, *Second Annual Gay Shame Awards and Walk of Shame*, at <http://www.gayshamesf.org/archives.htm> (last visited Feb. 25, 2004).

⁷⁰ Cooper, *supra* note 1, at 292.

⁷¹ *Id.*

⁷² *Id.* (quoting Johnny Noxema and Rex Boy).

⁷³ SMYTH, *supra* note 20, at 58 (quoting *BIMBOX* (emphasis added)).

⁷⁴ See generally Lauren Errea, *Queercore: A Musical Declaration of Queer Pride*, DAILY CALIFORNIAN, Feb. 8, 2002, available at <http://www.dailycal.org/article.php?id=7626> (stating "[q]ueer punk is about anti-assimilation. It's about using music as a medium to show people a way of life they never knew about before."). For a review of The Skin Jobs, see Ken Knox, *Review of "Burn Your Rainbow"*, FRONTIERS, Feb. 14, 2003, available at http://www.agitproprecords.com/skinjobs/_knews/navcon_knews.html (last visited Feb. 25, 2004). For reviews of The Rotten Fruits, see The Rotten Fruits webpage, and click on the links from the "Reviews" line, at <http://www.rottenfruits.com> (last visited Mar. 1, 2004).

current notions of gay pride to shreds”⁷⁵ with lyrics like: “Don’t imitate, stop trying to fit in. If everyone looked like everyone, then tell me ‘Just who would you fuck?’ And when the kids go ‘We’re gonna burn your rainbow and we’re having fun!’ Yeah! We don’t need you, we don’t care.”⁷⁶ Queer punk provokes its audiences with anti-assimilationist harangues, singing the virtues of promiscuity and rebellion. Here are The Rotten Fruits from their song, “Fuck Media Faggots”: “I don’t want to be ‘Queer as Folk,’ My life is no HBO joke. . . . Fuck Media Faggots, they don’t care. Fuck Media Faggots, they won’t dare.”⁷⁷

Where do these groups and others like them—the Whores of Babylon (Queers Fighting Religious Intolerance), Sissy (Schools Information Services on Sexuality), or PUSSY (Perverts Undermining State Scrutiny)⁷⁸—fit in the picture? Does embracing an anti-assimilationist, radical pro-difference, pro-marginalization position constitute part of the “so-called homosexual agenda”?

We live in a post-identity politics—a politics where formerly cohesive identities have fragmented to the point that it is no longer possible to talk of a “homosexual agenda”—“so-called” or otherwise. The “homosexual agenda” is fractured along multiple dimensions, including, classically, the political. So some self-identified gay men and lesbian women oppose the liberal pro-gay-rights project from the right, contesting the need for broad anti-discrimination laws based on sexual orientation. Bruce Bawer, editor of *Beyond Queer: Challenging Gay Left Orthodoxy*, Andrew Sullivan and others offer what Bawer calls “a new gay paradigm.”⁷⁹ the main thrust (though it comes in different variations) is to seek an end to all public or

⁷⁵ Knox, *supra* note 74.

⁷⁶ See The Skin Jobs, *Lyrics to “Burn Your Rainbow,”* at http://www.agitproprecords.com/skinjobs/_lyrics/navcon_lyrics.html (last visited Feb. 24, 2004).

⁷⁷ The Rotten Fruits, *Fuck Media Faggots*, available at <http://www.rottenfruits.com/FMedia.mp3> (last visited Mar. 1, 2004).

⁷⁸ See Cherry Smith, *What Is This Thing Called Queer?*, in *THE MATERIAL QUEER*, *supra* note 1, at 277, 279. These groups engaged in extravagant actions—“a highly ironic, camp, theatrical politics of direct action which bullied its way to the heart of the complacent media and put fun back into a wearied lesbian and gay movement.” *Id.*

⁷⁹ Bruce Bawer, *Introduction* to *BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY*, at ix, xiv (Bruce Bawer ed., 1996) [hereinafter *BEYOND QUEER*]. These writers and activists have been dubbed the “attack queers” or the “homocons” by their left opponents. See RICHARD GOLDSTEIN, *THE ATTACK QUEERS: LIBERAL SOCIETY AND THE GAY RIGHT* (2002). However, they reject the tag “gay conservatives.” “[F]ew of us would be considered conservative by anyone who objectively examined our politics,” says Bawer. “We variously call ourselves liberals, moderates, libertarians, and communitarians—or we eschew such labels altogether as increasingly irrelevant in a post-ideological era.” Bawer, *BEYOND QUEER*, *supra*, at xiii.

state-sanctioned forms of discrimination and to leave the rest alone. "No cures or re-educations; no wrenching civil litigation; no political imposition of tolerance;" Andrew Sullivan writes, "merely a political attempt to enshrine formal civil equality, in the hope that eventually the private sphere will reflect this public civility."⁸⁰ Within internal discussions on the right, it is acceptable to argue for social assimilation *through sexual restraint*. As John Berresford writes:

Among ourselves, we must be willing to talk about morals, to impose them on ourselves, and to do so conspicuously. As long as our primary image is one of gleeful promiscuity . . . we will be ostracized. Until we start imposing honesty, fidelity, and emotion on our lives—in other words, until we are willing to talk about moral standards—we will make little real progress in social acceptance.⁸¹

Other self-identified gay men, lesbian women, and queer theorists oppose the gay-rights-project from the left, challenging the very notion of sexual identities. Janet Halley's critique of the same-sex harassment protection in *Oncale*, discussed earlier, represents one variation. For Halley, the queer project "emphasizes the fictional status of sex, gender, and sexual orientation identity, and . . . affirms rather than abhors sexuality, 'dark side' and all."⁸² It "regards the homosexual/heterosexual distinction with skepticism and even resentment, arguing that it is historically contingent and is itself oppressive."⁸³ From this perspective, it is the gay-friendly construction of homosexuality that is problematic and reflects a deep chasm between anti-discrimination approaches and a more radical questioning of sexuality—a conflict "not simply between older 'gay' assimilationists . . . and 'queers' asserting their 'queerness'. Rather it is between those who think of the politics of sexuality as a matter of securing minority rights and those who are contesting the overall validity and authenticity of the epistemology of sexuality itself."⁸⁴

⁸⁰ Andrew Sullivan, *The Politics of Homosexuality*, in BEYOND QUEER, *supra* note 79, at 60, 80.

⁸¹ John W. Berresford, *A Gay Right Agenda*, in BEYOND QUEER, *supra* note 79, at 105.

⁸² Halley, *supra* note 22, at 82.

⁸³ *Id.*

⁸⁴ SMYTH, *supra* note 20, at 20 (quoting writer and activist Simon Watney). This perspective, in turn, has been dubbed, ironically, "queer"—as well as "selfish," "immature," and strategically foolish—from the gay right, doubly reversing the term's connotation: "*Queer*. Once—and still—anti-gay slur, it's been reclaimed by a minority of gay people as a supposedly affirmative label." Bower, *supra* note 79, at ix. The same-sex marriage debates have, if anything, catalyzed the rifts, further splitting open the "homosexual" faction. As Michael Warner observes, the framing of the same-sex marriage debate "has created a widening gap in the United States between the national lesbian and gay movement and queers." Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE, *supra* note 22, at 286.

In research exploring the dominant sexual ideologies in lesbian, gay, bisexual, and transgender (LGBT) communities published in the *Journal of Homosexuality* in 2003, the authors identify two “prominent sexual ‘ideological types’”—assimilationist and radical.⁸⁵ These positions are familiar, especially in the context of the same-sex marriage debates. But the truth is, each one of these positions comes in multiple flavors. Within the assimilationist position, there are dignity strands, but there are also moralist strands.⁸⁶ So too in the radical position, where there is a wide range of positions. In the gay-marriage context, for instance, there are arguments against the institution of marriage per se,⁸⁷ arguments against the resulting exclusion of marriage laws,⁸⁸ as well as more strategic arguments against marriage *for gays*.⁸⁹ And these tensions have been present for a

⁸⁵ Gust A. Yep et al., *A Critical Appraisal of Assimilationist and Radical Ideologies Underlying Same-Sex Marriage in LGBT Communities in the United States*, 45 J. HOMOSEXUALITY 45, 50 (2003).

⁸⁶ Some argue, in the same-sex marriage debates, for example, that marital reform would moderate sexual behavior among gay men and lesbian women, creating a better home environment for children. The idea here is that “unstructured sexual license leads to considerable social destabilization, which among other things, is destructive to the process of raising children.” *Id.* at 51. Gabriel Rotello argues, for instance, that “the core institution that encourages sexual restraint and monogamy is marriage.” *Id.* (quoting GABRIEL ROTELLO, *SEXUAL ECOLOGY* 250 (1997)).

⁸⁷ “Marriage is the antithesis of love, and will necessarily destroy it.” *Id.* at 54 (quoting Catherine Saalfeld, *Lesbian Marriage . . . (K)not!*, in SISTERS, SEXPERTS, QUEERS: BEYOND THE LESBIAN NATION 193 (Arlene Stein ed., 1993)).

⁸⁸ Michael Warner argues that marriage defines out the zone of regulable conduct. “As long as people marry,” Warner writes, “the state will continue to regulate the sexual lives of those who do not marry. . . . In the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people’s most intimate lives; it is the zone of privacy outside of which sex is unprotected.” Warner, *Beyond Gay Marriage*, *supra* note 84, at 267. Warner’s strategic intervention is to critique the exclusivity of marriage regardless of whether it permits same- or only different-sex union. His argument is that even same-sex marriage will have a set of negative consequences on those who are not married—whether gay or otherwise deviant or outside the norm. What it does is “sell out less assimilationist or privileged queers.” *Id.* at 275. In this sense, “marrying consolidates and sustains the normativity of marriage” at the expense of the non-assimilationists. *See id.*; *see also* Judith Levine, *Stop the Wedding!*, VILLAGE VOICE, July 23, 2003, at 40, 42:

Marriage—forget the “gay” for a moment—is intrinsically conservative. It does not just normalize, it requires normality as the ticket in. Assimilating another “virtually normal” constituency, namely monogamous, long-term, homosexual couples, marriage pushes the queerer queers of all sexual persuasions—drag queens, club-crawlers, polyamorists, even ordinary single mothers or teenage lovers—further to the margins.

⁸⁹ Some argue, for example, that marriage will not extend social approval to gays and lesbians. This last idea is that marital reform “is less likely to advance queer interests than it is to reinforce dominant social norms, defang queer movements, and increase queer

long time.⁹⁰ The different variations are themselves different ideologies. The two ideal types form a spectrum, not a dichotomous pair. There are, in effect, moral assimilationists, incremental assimilations, strategic assimilationists, among others, as well as radical anti-assimilationists, libertarian radicals, and separatists—a whole plethora of gay-friendly ideologies in the identified LGBT community.

Even within a single narrower community—the lesbian community, for example—there are recurring, sharp, often caustic conflicts. In fact, from a historical perspective, what may be most characteristic of lesbian cultural discourse and activism is its constant need to transgress—*itself*. Lesbian feminists of the 1970s—Adrienne Rich, Sheila Jeffries, Mary Daly, among others—reacted against the patriarchal elements that they perceived in lesbianism, especially the role-playing butch/femme identities that pervaded the lesbian underworld of the 1950s and 60s, and turned toward a more separatist approach.⁹¹ This sparked, in the 1980s, a reaction to what women saw as an “anti-sex” attitude and a turn to S/M—to “a new politics of outlawry, of sexual deviance.”⁹² As Emma Healey tells it, the 1990s “saw a new orthodoxy that trumpeted S/M sexuality while at the same time decrying anything vanilla.”⁹³ This new lesbian ideology was more willing to ally itself with gay men, giving rise to queer politics. This in turn engendered a rebirth of the lesbian feminist movement. In essays such as *Queer Straights*, critics railed against the new politics of queer as a regression to patriarchy and heterosexuality:

invisibility.” Yep et al., *supra* note 85, at 54. Though many who argue against same-sex marriage would take the position that if there is going to be heterosexual marriage then there should be no discrimination, others argue against same-sex marriage *even if there is heterosexual marriage*. One such argument posits that being lesbian is fundamentally different than being a heterosexual married woman, and should remain that way. Paula Ettelbrick writes:

As a lesbian, I am fundamentally different from non-lesbian women. That’s the point. Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as “Mrs. Attached-To-Somebody-Else.” Nor do I want to give the state the power to regulate my primary relationship.

Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 OUTLOOK: NAT’L LESBIAN & GAY Q. 9, 14 (1989).

⁹⁰ In the cover article titled “Homosexual Marriage?” in the August 1953 issue of ONE, the author, “an unabashed advocate of promiscuity,” answers “no!”, warning that “acceptance of homosexuality would necessarily lead to homosexual marriage and mandatory monogamy.” E. B. Saunders, *Homosexual Marriage?*, ONE, Aug. 1953, at 10.

⁹¹ See generally EMMA HEALEY, LESBIAN SEX WARS 56 (1996) (“Butches are simply aping heterosexuality, taking the worst attributes of men . . . and making it all their own. Thus, butches become an integral part of the system that oppresses women. . .”).

⁹² JEFFREYS, THE LESBIAN HERESY, *supra* note 19, at xi; SMYTH, *supra* note 20, at 26.

⁹³ HEALEY, *supra* note 91, at 148.

[T]he 'in your face radicalism' which is claimed to be the most important signifier of queer, is, in the end, hard to distinguish from plain old liberalism; queer's 'shocking' tactics constitute little more than a plea to be included in straight society, rather than a demand that we change it.⁹⁴

The bottom line is that, today, the "lesbian agenda" would be a meaningless term: it would be necessary to distinguish between "lesbian feminists," "lesbians who are also feminists," "radical lesbians" or "lesbian separatists," "heterofeminists," queer theorists, post-queer theorists, "libertarian lesbians," among others, to properly define a political intervention.⁹⁵ Monique Wittig famously remarked that "Lesbians are not women."⁹⁶ By this, I take it, she meant that the interests of lesbians do not coincide with those of lesbian feminists. Perhaps a more accurate statement would be, "Lesbians are not."

The point is that to refer to a "homosexual agenda" is as meaningless as to talk about an "American sexual agenda," an "American criminal law agenda," or for that matter an anti-"homosexual agenda." The internal positions vary widely. Even the more specific concept of a "homosexual agenda . . . directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct"⁹⁷ is incoherent. This agenda ranges from homosexual public-sex activism—from engaging in homosexual sex *in public*—to embracing sexual restraint and moral puritanism. How the myriad sexual projects compare is complex and it is what makes the sex wars unpredictable. It is not a war between homosexual activists (and their *companions de route*) against mainstream heterosexual Americans who don't want to be around gay and lesbians. It is a complex, multi-party conflict that affects conceptions of the self, relations to others, eroticism, sexual practices, etc. As one commentator writes in the *Daily Targum*, the Rutgers University paper, on the topic of same-sex marriage:

The media has constructed a binary opposition between all Queers along with their straight alliances, and the conservative Christian Right's wish for the state to prohibit the sanctioning of homosexual sins. But, as a radical, a lesbian and a feminist, my opposition to [normalizing homosexual relations] does not fall into these dichotomous categories.⁹⁸

⁹⁴ Julia Parnaby, *Queer Straights*, in ALL THE RAGE: REASSERTING RADICAL LESBIAN FEMINISM 3, 4 (Lynne Harne & Elaine Miller eds., 1996).

⁹⁵ *Id.* at xi-xiii, 110-11.

⁹⁶ See Monique Wittig, *The Straight Mind*, in THE STRAIGHT MIND AND OTHER ESSAYS 21, 32 (1992).

⁹⁷ *Lawrence v. Texas*, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting).

⁹⁸ Keri Sender, *Same-Sex Marriage: Flawed Institution*, DAILY TARGUM, May 1, 2002.

Sexuality is so central to each individual that every person has a sexual project—by which I mean a position on how others should act sexually, an *other regarding* ideology of sexual practice. These sexual projects may or may not be related to one's own sexual practices—some may actively engage in one type of practice only, yet firmly believe that others should (or should be allowed) to engage in other practices. (Sexual projects may also include complete *indifference* to the practices of others). What is important is not the sexual practices that the individual personally engages in, nor the bottom line dichotomous “pro” or “against” position on homosexuality or the morality of any particular sex act.⁹⁹ They may vary widely as between individuals who engage in very similar sexual acts—in fact, whether two persons engage in similar or different sex acts tells us very little about how their sexual projects compare. What matters is the ideology that surrounds other-regarding sexual views. Are they, for instance, based on a libertarian impulse, a libertine penchant, a pro-sex attitude, morality, religion, or other grounds? This matters because it will determine the future shape of coalitions and conflict in other sex wars in the criminal law and elsewhere.

The proliferation and fracturing of sexual projects destabilizes simple dichotomies. In the more technical terms of Arrow's Theorem, the fractiousness creates a multidimensional political voting model that may make it difficult to predict how coalitions will form or whether they will remain stable in future sex wars in criminal law and elsewhere. So, for instance, the alliances that formed in the *Lawrence* context become unstable in the same-sex marriage debates, where anti-marriage libertarians and gays may ally with conservative legal moralists to overcome the pro gay-rights and liberal coalition. This is precisely what makes the sex wars so unpredictable, and why we need to engage in a far more nuanced analysis of the different sexual projects to understand how they result in coalitions, alliances, and ultimately victories or losses. It also implies, paradoxically, that we need to attend more carefully to fractiousness in the gay-friendly camp of the *Lawrence* decision.

⁹⁹ Because sexual projects are not coextensive with practices or with bottom line attitudes toward identifiable practices, there is little if any empirical data on sexual projects. The best empirical evidence on attitudes and practices simply does not address the landscape of sexual projects. For the best evidence on attitudes and practices, see TOM W. SMITH, NAT'L OPINION RESEARCH CTR., AMERICAN SEXUAL BEHAVIOR: TRENDS, SOCIO-DEMOGRAPHIC DIFFERENCES AND RISK-BEHAVIOR (Dec. 1998), at <http://www.norc.uchicago.edu/online/sex.pdf>; see generally KINSEY INST. FOR RESEARCH IN SEX, BRIEF SUMMARY OF U.S. STUDIES (COMPILED JUNE 1999), available at <http://www.indiana.edu/~kinsey/resources/bib-homoprev.html> (last visited March 4, 2004) (reviewing all the relevant studies since the 1948 and 1953 Kinsey studies). These studies, however, tell us little about the fragmentation of other-regarding sexual projects.

II.

What would it sound like to ambiguate the result in *Lawrence* from a gay-friendly perspective? In her review in *Artforum* of the Diane Arbus exhibition *Revelations*, Judith Butler probes the curious relationship between generations of prohibitory norms.¹⁰⁰ Diane Arbus, in her photographs, rebelled against the prevailing norms of bourgeois society that erased the stigmatized body from view—the prohibitory norms that hid the physically or mentally handicapped from the public gaze. Arbus's photographs are renowned for their many disturbing representations of the deviant—a veritable freak show of deformed bodies, dwarves, muscle men, and the mentally ill. Her photographs exposed oddity, buried in everyday portraits. *The Human Pincushion*, Ronald C. Harrison, N.J. (1962) depicts the proud, perhaps defiant, bare chested, tattooed Mr. Harrison with three-inch pins sticking through his throat, forehead, cheeks, lips, arms and chest. The photographs are “fascinated by human distortions, playing on spectacle, pandering to the unseemly desire to gawk at what might seem aberrant, to peer, to invade.”¹⁰¹

In their time, Arbus's photographs challenged the prohibitory norm of surface aesthetics. Today, however, the photographs trigger a different prohibitory norm—the norm against objectifying the deviant, against gawking at the stigmatized body. “We are not supposed to make into visual spectacles human bodies that are stigmatized within public life or to treat them as objects available for visual consumption.”¹⁰² Few are willing to pander to the desire to gawk. Yet the more modern prohibition against gazing at the formerly prohibited reproduces its own desire. As Judith Butler explains,

[O]ne finds oneself wanting to see what one “should not” enjoy seeing, and now partly to test the thesis that these photos are nothing but specularization or objectification. One does not, from a critical perspective, want to accept such a blanket judgment without first seeing for oneself, so the desire to “see for oneself” is instigated by the newer prohibition as well. There is in Arbus—and in the discomfort with her work—always that struggle: a certain solicitation to see what one should not see.¹⁰³

Is it the original prohibition that accounts for our fascination today? Are the photographs more irresistible because of the redoubled prohibition, like some kind of return of the repressed? Does the desire to see what we should not see make the seeing all that more intriguing? Would there be

¹⁰⁰ Judith Butler, *Surface Tensions*, ARTFORUM, Feb. 2004, at 119-24.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

any fascination with seeing at all if there had not been the original prohibition? Does our present fascination require a former prohibition?

The notorious debates over "camp"—an older, equally ambiguated, and highly contested term of sexual identity¹⁰⁴—reflect much of this subtle interaction between norm and prohibition. For some cultural critics, camp could only exist *against* the norm. In his response to Susan Sontag's essay, "Notes on 'Camp,'" Andrew Britton proposed that camp could simply not exist without the conventions of masculinity. Although camp may define itself precisely in opposition to those conventions of masculinity, it depends on their continuing to exist. "The camp gay man declares," Britton states, "'Masculinity is an oppressive convention to which I refuse to conform'; but his non-conformity depends at every point on the preservation of the convention he ostensibly rejects—in this case, a general acceptance of what constitutes 'a man.'"¹⁰⁵ The rejection of the norm, Britton suggests, requires the norm. Role-playing demands the foil. "Camp behavior is only recognisable as a deviation from an implied norm, and without that norm it would cease to exist, it would lack definition. It does not, and cannot, propose for a moment a radical critique of the norm itself."¹⁰⁶ This is so because the camp identity, according to Britton, plays off the convention.¹⁰⁷

Part of the vitality of camp, then, is the transgression. "Camp requires the *frisson* of transgression, the sense of perversity in relation to bourgeois norms which characterises the degeneration of the Romantic impulse in the second half of the nineteenth century, and which culminates in England

¹⁰⁴ The definition of "camp" is itself the source of much contestation, so any simple definitions will be vulgar. Susan Sontag, who triggered much of the debate over defining camp with her essay *Notes on Camp*, writes that "the essence of Camp is its love of the unnatural: of artifice and exaggeration." Susan Sontag, *Notes on 'Camp'*, in *CAMP: QUEER AESTHETICS AND THE PERFORMING SUBJECT, A READER* 53, 53 (Fabio Cleto ed., 1999) [hereinafter *CAMP*]. Mark Booth defines it as "to present oneself as being committed to the marginal with a commitment greater than the marginal merits." Mark Booth, *Campe-toi! On the Origins and Definitions of Camp*, in *CAMP*, *supra*, at 66, 69. Others have referred to it as "queerdom's own ironic social theory, which developed to let us criticize (particularly heterocentrist) relations of power." Carol Queen & Lawrence Schimel, *Introduction to POMOSEXUALS: CHALLENGING ASSUMPTIONS ABOUT GENDER AND SEXUALITY* 19, 21 (Carol Queen & Lawrence Schimel eds., 1997).

¹⁰⁵ Andrew Britton, *For Interpretation: Notes Against Camp*, in *CAMP*, *supra* note 104, at 136, 137-38.

¹⁰⁶ *Id.* at 138.

¹⁰⁷ Britton writes:

Being essentially a mere play with given conventional signs, camp simply replaces the signs of "masculinity" with a parody of the signs of "femininity" and reinforces existing social definitions of both categories. The standard of "the male" remains the fixed point, in relation to which male gays and women emerge as "that which is not male."

with Aestheticism and in France with the *décadence*,” Britton writes. “Camp is a house-trained version of the aristocratic, anarchistic ethic of transgression, a breach of decorum which no longer even shocks, and which has gone to confirm the existence of a special category of person—the male homosexual.”¹⁰⁸ This idea of *frisson* harks back to Jean Genet—and, before him, to the Surrealist, André Breton. Genet’s romanticization of the delinquency of homosexuality—of homosexual rape in *Querelle*—did not aspire to decriminalization. As Jean-Paul Sartre writes in his study of Genet, *Saint Genet*, “Genet does not want to change anything at all. Do not count on him to criticize institutions. He needs them, as Prometheus needs his vulture.”¹⁰⁹

Part of what may be going on is the erotic attraction to the utterly deviant—but only part. There is far more to desire than the erotic, and the biological dimensions of homosexuality undermine any simple association between sexual orientation and the appeal of deviance. Yet there may well be an erotic dimension to the prohibited. Sheila Jeffreys quotes a delicious passage from Sarah Schulman’s novel, *After Dolores*, where a character says:

It’s too easy to be gay today in New York City. I come from those times when sexual excitement could only be in hidden places. Sweet women had to put themselves in constant danger to make love to me. All my erotic life is concerned with intrigue and secrets. You can’t understand that these days, not at all. Lesbians will never be that sexy again.¹¹⁰

Lesbians will never be that sexy again. To what extent does the erotic derive from the forbidden? *Glamour* magazine reports having conducted, in partnership with MensHealth.com, a survey of 2793 men to explore issues of sexual practices. One question they asked was “Why are men so fixated on having anal sex?” (Who knew?) Forty-seven percent of the respondents answered “because it’s taboo.” (Twenty-two percent chose “because it feels great,” and thirty-one percent “because it’s an accomplishment just talking her into it.”)¹¹¹ Does the taboo really account for the erotic practice? And is the practice really erotic if it is brought on by taboo, or is it some other kind of desire? Chicago public radio reports an increase in rates of sexually transmitted diseases. One explanation is a lot

¹⁰⁸ *Id.*

¹⁰⁹ JEAN-PAUL SARTRE, *SAINT GENET: ACTOR AND MARTYR* (Bernard Frechtman trans., 1963) (1952).

¹¹⁰ JEFFREYS, *THE LESBIAN HERESY*, *supra* note 19, at 100 (quoting SARAH SCHULMAN, *AFTER DOLORES* 57 (1990)).

¹¹¹ *Your Trickiest Sex & Love Questions Answered by 2,793 Men*, *GLAMOUR*, Jan. 2004, at 140-41.

more experimenting with bisexual relations among teenagers in part because of the stigma of same-sex intercourse.¹¹² Survey data from the period 1988 to 1998 suggests an increase in the percentage of people with same-sex partners, despite constant levels of “exclusively” homosexual men and women. The survey data—from the General Social Surveys conducted by the National Opinion Research Center at the University of Chicago over the period 1988 to 1998—revealed between a doubling and tripling of the likelihood of having a same-gender sex partner over the period (though the number remained low in 1998, 4.1 percent for men and 2.8 percent for women).¹¹³ The increase could not be attributed to changing demographics, increased urbanization or educational attainment, or racial or ethnic shifts in the population. Is the increase due to greater social acceptance of homosexual relations or to the taboo associated with same-sex relations?

Think of unsafe sex among gay men in urban areas—what is known as “barebacking,” a term used to describe unprotected anal sex.¹¹⁴ Or even more troubling, “bug chasing,” the practice of some gay men of actively trying to acquire HIV through unprotected same-gender sex. A recent documentary by filmmaker Louise Hogarth, *The Gift*, documents the new development. The title derives “from the term ‘gift givers,’ or HIV-positive men who give ‘the gift’ of HIV infection.”¹¹⁵ In the documentary, “a soft-spoken, Midwestern college youth named Doug Hitzel tearfully recalls what drove him to become a ‘bug chaser’—an HIV-negative man who seeks to be infected with the virus that causes AIDS.”¹¹⁶ The attraction to danger and to deviance must play a role in these practices.

¹¹² *Rise of Syphilis in Chicago*, Chicago Public Radio, May 7, 2003, available at <http://www.wbez.org/programs/specials/spring03series/schedule.asp>.

¹¹³ Amy C. Butler, *Trends in Same-Gender Sexual Partnering, 1988-1998*, 37 J. SEX RES. 333, 342-43 (2000).

¹¹⁴ See generally Trevor A. Hart et al., *Sexual Behavior Among HIV-Positive Men Who Have Sex With Men: What's in a Label?*, 40 J. SEX RES. 179 (2003); Terry Beswick, *Bareback 'Outings' Spark Debate Over Well-Known Secret*, BAY AREA REP., July 27, 2000, at 1; Steve Dow, *Denial Becomes The New Language Of Casual Sex*, SYDNEY MORNING HERALD, July 3, 2003, at 11; Matthew Laza, *Men Who Want AIDS*, SPECTATOR, Feb. 1, 2003, at 21; Jennifer Wallace, *Daemonic Desire In The Bedroom, Or Just Consumer Choice?*, TIMES HIGHER EDUC. SUPPLEMENT, Sept. 6, 2002, at 34. According to the *amicus curiae* brief of the Concerned Women for America in the *Lawrence* litigation at the Supreme Court, “A World Wide Web search on Feb. 8, 2003, utilizing the ‘Google’ search engine and the term, ‘bareback sex,’ produced links to 31,000 Web sites.” Brief of Amicus Curiae Concerned Women for America at 28, *Lawrence* (No. 02-102).

¹¹⁵ Robert W. Welkos, *When ‘the Gift’ is HIV*, L.A. TIMES, Jan. 11, 2004, at E1; see also Gregory A. Freeman, *In Search of Death*, ROLLING STONE, Feb. 6, 2003, at 45.

¹¹⁶ Welkos, *supra* note 115. In an interview with the *L.A. Times*, Hitzel explains why he sought out the virus: “Initially, something in me said you probably shouldn’t do that, but after a while, I thought [becoming HIV-positive] would make me more popular. I ended up

Criminality, prohibition, danger—seduction. As Jack Katz powerfully demonstrates in *Seductions of Crime*, the thrill of breaking the law can produce an emotional high. Katz describes in compelling detail the thrill-seeking of some of his students who shoplift. He shows, through their own words, how merchandise in stores become so much more irresistible *because* they are forbidden.

There we were, in the most lucrative department Mervyn's had to offer. . . . Once my eyes caught sight of the beautiful white and blue necklaces alongside the counter, a spark inside me was once again ignited. . . . Those exquisite puka necklaces were calling out to me, "Take me! Wear me! I can be yours!"¹¹⁷

It is the criminality of shoplifting that makes the jewelry so attractive, the theft so thrilling, and the object so compelling. One student explains: "Every time I would drop something into my bag, my heart would be pounding and I could feel this tremendous excitement, a sort of 'rush,' go through me."¹¹⁸ Another student reports, "The experience was almost orgasmic for me. There was a build-up of tension as I contemplated the danger of the forbidden act, then a rush of excitement at the moment of committing the crime, and finally a delicious sense of release."¹¹⁹ Yet another recalls: "It's really funny being 23 years old now and in writing this, I can't stop feeling how thrilling it was, certainly a feeling much like the anticipation of sex."¹²⁰

The same prohibition helps make guns so seductive to detained youths,¹²¹ gangsta-rap so exciting for suburban youths,¹²² and pink underwear so attractive to adults. Pink underwear? Sheriff Arpaio of Maricopa County, Arizona, started issuing pink boxers to his jail inmates in order to stem vandalism of underwear stock—Arpaio reported losing more than \$40,000 worth of purloined underwear in a nine-month period in 1995. The pink boxers became such a phenomenon, that Arpaio started selling the pink boxers on the free market for \$10 per boxers.¹²³ According to the

doing it once or twice. After a while, it became apparent people would like me if I didn't have a condom." *Id.*

¹¹⁷ JACK KATZ, *SEDUCTIONS OF CRIMES* 54 (1988).

¹¹⁸ *Id.* at 71.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See generally Bernard E. Harcourt, "Hell no, you can't jack that fool. He stays strapped. He's strapped all the time": Talking about Guns at an All-Boy Correctional Facility in Tuscon, Arizona, in *GUNS, CRIME, AND PUNISHMENT IN AMERICA* 68 (Bernard E. Harcourt ed., 2003).

¹²² St. John, *supra* note 61, at 1, 5.

¹²³ See Tony Ortega, *Boxer Rebellion*, PHOENIX NEW TIMES, Nov. 2, 1995, available at http://www.phoenixnewtimes.com/special_reports/arpaio/media/110295.html; Richard

Phoenix New Times writing in 1995, "Souvenir versions of the boxer shorts have become all the rage. Volunteers in the 2,500-member Sheriff's Posse have sold 3,000 pairs of pink skivvies, grossing \$30,000" in 1995 alone.¹²⁴

But there is more to homosexual erotic attraction than the forbidden, and there must also be more to the forbidden than erotic attraction. There is something else, something deeper about the attraction of deviance, about the urge to resist hegemonic power, about the felt need to "question authority," about the desire to "subvert the dominant paradigm." How do these emotions, desires, urges, personalities depend on, relate to, derive from prohibitory norms? Sheila Jeffreys writes about "the lesbian romance with outlaw status." She suggests that "[t]he lesbian's status as outlaw is, for many lesbians, one important source of the satisfaction to be gained from lesbianism. . . . [L]esbianism offers the glamour and excitement of outlawry."¹²⁵ As Ruby Rich explains,

For many women, the drive toward lesbianism was not only sexual but also a will to be the outlaw, the same drive that moved other subcultures, like the Beats, to cross to the 'wrong' side of the tracks, if only metaphorically. Thus, there was a very real sense of loss associated with the hard-won respectability: a loss of taboo and with it eroticism.¹²⁶

In fact, some of these critics argue that, as lesbianism became more acceptable, the appeal of the outlaw led to "outlaw sexuality"—sodomasochism. "Where once outlawry could be assured simply by adoption of lesbian sexuality and lifestyle it seems that the apparently greater social possibilities gained for lesbians by lesbian liberation have made things too easy," thus leading to the new "sexual outlaw" lesbians engaging in S/M.¹²⁷ "A political movement of sexual outlawry has developed in the eighties amongst lesbians of which the glamourising of prostitution is but one part. The new lesbian politics of transgression is an offshoot of an older tradition in gay male culture and politics."¹²⁸

The outlaw impulse, Jeffreys suggests, is tied closely to the attraction to the lesbian bar and bar culture—places that are often described as "dingy" or "decadent." "Lesbian bars," at least in London, "have traditionally been sited in cellars or basements with backed up toilets, crush,

Williamson, *Trends in the Region: As Priorities Shift, Big County Jails Are Holding the Short End*, BOND BUYER, July 1, 2003, at 38.

¹²⁴ Ortega, *supra* note 123.

¹²⁵ JEFFREYS, *THE LESBIAN HERESY*, *supra* note 19, at 99.

¹²⁶ *Id.* at 100.

¹²⁷ *Id.* at 99.

¹²⁸ *Id.* at 108.

smoke, and terrible food,"¹²⁹ likely in order to escape the attention of homophobes.¹³⁰ In part, what may account for this attraction is, Jeffreys suggests,

nostalgie de la boue, an expression coined in the end of century decadence of the 1890s to denote a fascination with 'low-life' amongst the bourgeoisie. This fascination was acted out by middle-class straight men mainly through consorting with prostitutes in London bars. . . . Oscar Wilde was fascinated with his favourite version of boue i.e. use of young working class male prostitutes and drugs and not just in practice but in art. In *The Picture of Dorian Gray* Wilde painted a romantically decadent picture of the opium den.¹³¹

The opium den of the late nineteenth century plays an equally mystical role in the work of Charles Baudelaire. The forbidden, the haunting pleasures of escape, the fascination with *spleen*, run through *Les Fleurs du Mal*. The romanticized Bohemian life of the late nineteenth century cohabited parasitically alongside, within, and against the dominant

¹²⁹ *Id.* at 101.

¹³⁰ A classic description of the lesbian and gay bar is provided by Radclyffe Hall in *The Well of Loneliness*:

As long as she lives Stephen never forgot her first impressions of the bar known as Alec's—that miserable meeting-place of the most miserable of all those who comprised the miserable army. That merciless, drug-dealing, death-dealing haunt to which flocked the battered remnants of men whom their fellow-men had at last stamped under; who, despised of the world, must despise themselves beyond all hope, it seemed, of salvation. There they sat, closely herded together at the tables, creatures shabby yet tawdry, timid yet defiant—and their eyes, Stephen never forgot their eyes, those haunted, tormented eyes of the invert.

JEFFREYS, THE LESBIAN HERESY, *supra* note 19, at 102 (quoting RADCLYFFE HALL, THE WELL OF LONELINESS 393 (1982)).

¹³¹ JEFFREYS, THE LESBIAN HERESY, *supra* note 19, at 103. Sheila Jeffreys is deeply critical of these outlaw instincts, especially as they relate to heterosexual desire. To her, the heterosexual can use the outlaw fantasy as a way to reify his desire for normality. For the lesbian, though, there is no out. *Id.* at 112.

The rebelliousness that upper class white men have engaged in historically has not hurt them. It has been a rite of passage. They journey to the underworld composed of women and boys in prostitution, dabble in drugs and exploitative and abusive sex, then succeed to the family business or Harley Street. This form of rebellion is specifically masculine and has generally been carried out at the expense of women. The underworld is a necessary flipside which provides light relief as well as a reminder of the reasons to pursue respectable marriage.

Id. As she writes elsewhere:

Th[e] romance with decadence and outlawry exists in heterosexual culture too and particularly in gay male culture. Rebellious counter-cultural heterosexuals who gain satisfaction from living in opposition to suburban values can get decadent kicks from a sleazy jazz nightclub. For heterosexuals decadence is a chosen path which can be swapped at any moment for a regular Neighbourhood type lifestyle. For lesbians and gay men the sordid nature of our social venues is the result of our oppression.

Id. at 102.

bourgeois society. It fed off the moral and legal opprobrium of the bourgeoisie. It needed bourgeois society in the same way that camp needs masculinity.

Perhaps the best way to understand the constitutive dimensions of deviance is to listen carefully to the more radical activists today—the second wave of more militant, radical, younger queer activists,¹³² sometimes called “post-queer,”¹³² Queercore, or pomo-queer. What do they seek from deviance? In the introduction to their edited volume, *PomoSexuals*, Carol Queen and Lawrence Schimel write:

Pomosexuality lives in the space in which all other non-binary forms of sexual and gender identity reside—a boundary-free zone in which fences are crossed for the fun of it, or simply because some of us can't be fenced in. It challenges either/or categorizations in favor of largely unmapped possibility and the intense charge that comes with transgression. It acknowledges the pleasure of that transgression, as well as the need to transgress limits that do not make room for all of us.¹³³

Writing about Queercore, Dennis Cooper suggests:

Based on everything I've read, heard, interpreted, and felt, they are disappointed that so many lesbians and gays have accepted the heterosexual model of normalcy, reiterating all of society's mistakes in Disneyesque ghettos like West Hollywood, the Castro, the Village. The new queers accept that assimilation [is] irreversible for much of lesbian/gay culture at this point. So they're trying to construct an alternate culture in and around it. They don't pretend for a moment that they can alter the dominant culture—gay or straight. They don't want to. All they really want is to be taken seriously. And left alone.¹³⁴

Left alone. Could that possibly mean left alone while leaving in place the legal prohibition against homosexual relations?

In the U.K., there developed a group called “Homocult-perversers of culture” based in Manchester in the early 1990s that positioned itself in opposition to the queer activist group OutRage as “too queer to be OutRaged.”¹³⁵ In their poster, they declare that the terms “lesbian and gay” describe:

¹³² As Smyth explains, “Several US cities have recently [1992] seen the birth of groups of ‘New Radicals’—young queers who are too queer for Queer Nation and have begun to pit themselves in opposition, not to heterosexuals, but to the ‘assimilationist’, sell-out lesbian and gay ‘community.’” SMYTH, *supra* note 20, at 57. “The New Radicals accuse gays and lesbians of appeasement, of complicity in the patriarchal sexism and racism that the early gay-libbers once had mandate to challenge. Pointing to the rampant gender and racial segregation and class discrimination in gay society, they label gays ‘heterosexist’—and they mean it.” *Id.* at 57 (quoting Brian Rafferty, NYQ, Jan. 12, 1992).

¹³³ Queen & Schimel, *supra* note 104, at 19, 23.

¹³⁴ Cooper, *supra* note 1, at 296.

¹³⁵ SMYTH, *supra* note 20, at 58.

Persils fucked up by privilege who wish to blend with sick society rather than change it. . . . OutRage is a cosy sham. You can only be outraged by what surprises you. It's no surprise to common queers that there is no justice for us. We are not outraged. WE ARE DEFIANT.¹³⁶

This defiance is a form of radical critique that goes beyond mere reform. It aims instead at "radical social change: change which strikes at the 'root,' at the 'source,' at the 'structural foundations' of the social 'system,' pushing change forward towards transformation of the social totality rather than mere reformation of even conservation of this existing system."¹³⁷ There are more theorized statements of this position—or perhaps less radical positions that nevertheless seek more than reform. Cathy Cohen expresses this position in her article *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*,¹³⁸ where she too laments the failed potential of queer politics. She argues that "a truly radical or transformative politics has not resulted from queer activism," in large part because "instead of destabilizing the assumed categories and binaries of sexual identity, queer politics has served to reinforce simple dichotomies between heterosexual and everything 'queer.'"¹³⁹ What has been left unchallenged is "an understanding of the ways in which power informs and constitutes privileged and marginalized subjects on both sides of this dichotomy."¹⁴⁰ Cohen argues for a "new politics":

I envision a politics where one's relation to power, and not some homogenized identity, is privileged in determining one's political comrades. I'm talking about a politics where the *nonnormative* and *marginal* position of punks, bulldaggers, and welfare queens, for example, is the basis for progressive transformative coalition work. Thus, if there is any truly radical potential to be found in the idea of queerness and the practice of queer politics, it would seem to be located in its ability to create a space in opposition to dominant norms, a space where transformational political work can begin.¹⁴¹

The thrust of this "new politics" is opposition to dominant norms by all those "who stand on the outside of the dominant constructed norm of state-sanctioned white middle- and upper-class heterosexuality."¹⁴² It

¹³⁶ *Id.* (quoting an Anonymous Homocult poster). The term "persils" refers to "whiter than white." See *id.*

¹³⁷ Robert Andrew Nowlan, *Critique as Radical Praxis*, in *THE MATERIAL QUEER*, *supra* note 1, at 362.

¹³⁸ Cathy Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUD. 437 (1997) (on file with author).

¹³⁹ *Id.* at 438.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 441.

focuses on a close analysis of "the intersection of systems of oppression."¹⁴³ It proposes a more expansive understanding of political coalitions that embraces other marginalized identities based on race, class, etc. It is a politics different from liberal or civil rights—frameworks that are ineffective at confronting homophobia, Cohen argues. Civil rights, Cohen asserts, "do not change the social order in dramatic ways; they change only the privileges of the group asserting those rights."¹⁴⁴ The reason is that civil rights movements seek only access to the dominant framework, they do not challenge the framework of rights. But it is that framework of rights—not the lack of civil rights—that produces the systematic homophobia. It is "the nature and construction of the political, legal, economic, sexual, racial and family systems within which we live."¹⁴⁵

The problem, of course, is that Cohen simply substitutes "white middle- and upper-class heterosexual" for "heterosexual," without in any way problematizing the category, the idea of class, or the concept of heterosexuality itself. It seems that the more theorized the expression of the radical position, the less well it captures the positive underbelly of deviance. There has to be something more than simple class or identity warfare. There must exist a space for a genuine non-assimilationist, non-reformist, nihilist, hedonistic appreciation of marginalization.

Perhaps the best or only way to express this politics, then, is through a pastiche of post-queer venom. It has something to do with "*the intense charge that comes with transgression and the pleasure of that transgression.*"¹⁴⁶ It involves "*an alternate culture in and around it, to be taken seriously, and left alone.*"¹⁴⁷ It is a "*boundary-free zone in which fences are crossed for the fun of it, or simply because some of us can't be fenced in. It challenges either/or categorizations in favor of largely unmapped possibility.*"¹⁴⁸ It is nostalgic, transgressive, full of hope and hopeless at the same time. It is a politics of *spleen*—an expression that refers back and captures the uncomfortable co-dependence of nineteenth-century Bohemia on bourgeois law and society.

I have endeavored here to explore the constitutive, dark side of the penal sanction. There are, of course, other friendly but skeptical accounts of *Lawrence*—but they only scratch the surface. There is the backlash

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 442 (quoting URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (1995)).

¹⁴⁵ *Id.* at 443 (quoting VAID, *supra* note 144).

¹⁴⁶ Queen & Schimel, *supra* note 104, at 23.

¹⁴⁷ Cooper, *supra* note 1, at 296.

¹⁴⁸ Queen & Schimel, *supra* note 104, at 23.

argument—the incrementalist argument against *Lawrence*-type litigation.¹⁴⁹ Some pro-gay activists warn that the *Lawrence* decision may scare many away from the prospect of gay marriage or create a more hostile environment for gay men and lesbian women.¹⁵⁰ And of course, there have been a number of judicial decisions rendered since *Lawrence*, as well as polling data, that flame these debates. With each new ruling, with each new poll, there are loud waves of “I told you so” rolling through the legal academy—on both sides of the debate. The Eleventh Circuit upheld Florida’s adoption laws which preclude adoption by any person who engages in homosexual activity.¹⁵¹ A Kansas court of appeals upheld a disparate sentencing scheme that punishes far more severely an older teenager when he engages in sex with a same-sex younger teenager as

¹⁴⁹ The incrementalist argument is captured well in this letter to the editor by a self-identified gay man to the L.A. WEEKLY:

I don’t know what is more pathetic, the retrograde hatefulness of the current “gay backlash” or the screechy, pushy tactics from left-wing gays that caused it How often do people really get convicted under arcane sodomy laws? Haven’t most major employers adopted “domestic partnership” policies to extend the same insurance and other benefits to its gay employees that everyone else enjoys? Instead of building methodically on those gains while maintaining a positive public image, GLAAD and other gay political organizations have been waging war on any public or private group that espouses religious convictions that do not accept homosexuality (and that’s most of them). They have defended explicit sexual messages in advertising and promoted homosexual education to schoolchildren. Quiet assimilation has long been discarded as a goal by gay leadership in favor of in-your-face queer activism.

Tony Blass, *Letters to the Editor: Gay Rights Overkill*, L.A. WEEKLY, Aug. 19, 2003.

¹⁵⁰ For an illustration of pro-gay fear, see McGeveran, *supra* note 61, at 1:

So recently, it seemed, it had been time to break out the Skyy Vodka and cranberry juice to cheer the Supreme Court’s June 26 ruling in *Lawrence v. Texas*, which struck down the 17-year-old ruling in *Bowers v. Hardwick*, which upheld states’ rights to outlaw sodomy. Fearmongers on the right, and their perennially hopeful counterparts on the left, were already talking about the inevitability of gay-marriage rights as a result of the majority’s decision, which went beyond simply striking down the Texas law to offer gays a measure of the same “privacy” afforded women under *Roe v. Wade* But before long, a Gallup poll found an unexpected reversal in the country’s feelings about gay marriage: In the space of less than two months, popular support for extending legal rights to gay unions had dropped eight percentage points, from 57 percent to 49 percent. Buzz-kill!

¹⁵¹ *Lofton v. Sec’y of the Dept. of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004). The statute in question states that “No person eligible to adopt under this statute may adopt if that person is a homosexual,” and has been interpreted by Florida courts to apply only to persons who are known to engage in current voluntary homosexual acts. The court there found a rational basis for the discrimination in the state’s interest in assuring an optimal home environment for children; relying on the best-interest-of-the-child analysis, the court declared that “because of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas.” *Id.*

opposed to a different-sex younger teenager.¹⁵² The Massachusetts Supreme Judicial Court, in two separate decisions, has required same-sex marriage, not just civil union. And the polling data reflect a backlash in public opinion regarding both whether homosexual relations should be legal—the *Lawrence* issue—and whether the state should allow same-sex marriage—at least in the short term.¹⁵³

But the backlash critique—whether right or wrong—still aspires to the elimination of criminal sodomy laws. It is a strategic argument, not an outlaw argument. The same is true of the other friendly but skeptical critique, the accommodation argument—namely the idea that civil rights litigation never really challenges the anti-gay norms.¹⁵⁴ These arguments

¹⁵² The Supreme Court had remanded the case to the Kansas state court for reconsideration in light of *Lawrence*. The state court held that the sentencing disparities were justified by “traditional sexual mores” as well as the interest in preventing sexually transmitted diseases. See *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).

¹⁵³ See USA TODAY, CNN GALLUP POLL RESULTS (July 28, 2003), at <http://www.usatoday.com/news/polls/tables/live/2003-07-28-poll-gays-issues.htm> (last visited April 6, 2004). According to historical polling data from USA Today/Gallup polls, public opinion became consistently and increasingly more favorable toward the legalization of homosexual relations between consenting adults during the period from July 1988 to May 2003—just before the *Lawrence* decision was released. *Id.* Whereas only 35% of the population favored the legalization of homosexual relations in July 1988, that number steadily increased during the 1990s, reaching 50% in February 1999 and going as high as 60% in May 2003. *Id.* However, one month after the *Lawrence* decision, that number had shot down to between 48-50%. *Id.* In a similar vein, those who believed homosexual relations should *not* be legal decreased from 57% in July 1988 to about 35-37% in May 2003. *Id.* Yet one month after the *Lawrence* decision, the number was back up to between 44-46%. *Id.* A New York Times/CNN poll reveals a similar trend: whereas in July 2003, their polling data revealed that 54% of respondents supported the legality of homosexual relations, in December 2003 that number had decreased to 41%. N.Y. TIMES, Dec. 21, 2003, at 1. (It is possible, of course, that people understand the word “legality” differently now, associating it with gay-marriage rather than sodomy laws). The same trends in public opinion on the question of gay-marriage have also been identified, though the time frame is more narrow. Again, according to the USA Today/Gallup polls, over the period May 2001 to May 2003, public opinion increasingly favored allowing homosexual couples to enter civil unions, up from 44% to 49%, respectively. However, one month after *Lawrence*, the number had fallen to 40%, lower than any previously recorded poll during the period. See USA TODAY, CNN GALLUP POLL RESULTS (July 28, 2003), at <http://www.usatoday.com/news/polls/tables/live/2003-07-28-poll-gays-issues.htm> (last visited April 6, 2004).

¹⁵⁴ Some argue, for instance, that the “political bargains” that gay-rights advocates make “circumvent rather than embrace the challenge to heteronormativity, thus leaving dominant norms intact.” Mary Bernstein, *Gender, Queer Family Policies, and the Limits of Law*, in QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 420, 420 (Mary Bernstein & Renate Reimann eds., 2001). The reason, Bernstein argues, is that advocates have to frame the issues in the least offensive or threatening way in order to achieve any

all aspire to a liberation ideal that does not necessarily embrace deviance.¹⁵⁵ I have sought instead to explore the positive side of the deviant impulse.

III.

With all this in place, it may be possible to reconstruct Justice Scalia's incendiary dissent, to tweak it so that it reflects more accurately the nuances and subtleties of our contemporary sex wars. To begin, Justice Scalia is certainly right that there is a culture war in this country that encompasses, among other things, the trilogy of sexuality, family, and morality/religion—what I would call a war of sexual projects. Justice Scalia is also right that the Supreme Court partakes in the culture wars in *Lawrence*. The Court's engagement, however, is by no means new or a departure from some neutral role as arbiter of the democratic rules of engagement. The Supreme Court has been a central player in these culture wars since at least the mid-twentieth century. There is a rich tradition of gay-rights cases going back to the 1950s. Joyce Murdoch and Deb Price chronicle the history of Supreme Court cases affecting the rights of gay men and lesbian women in their excellent book, *Courting Justice: Gay Men and Lesbians v. the Supreme Court*. They trace the start of the gay-rights lineage of cases back to *ONE v. Olesen*, a 1957 Supreme Court ruling on the censorship, on obscenity grounds, of the nation's first homosexual publication, *ONE*—where the court ruled in favor of the gay publication and imposed the same

victories. To succeed, they have to be framed in more innocuous right-to-privacy terms. So, Bernstein writes:

Changes in laws regarding sexual orientation are dependent on the ability to frame the challenge in a way that leaves heteronormativity untroubled. Sodomy has been decriminalized in more than half the American states, because it was framed as an issue of privacy or as a victimless crime. Such a framing has helped in gaining a narrow legal victory but has neither challenged the underlying opprobrium associated with homosexuality nor helped in the quest for acceptance. Even the symbolic victory of decriminalization is mooted by the insistence on privacy.

Id. at 439.

¹⁵⁵ This is true, as well, of the early queer activism, which, though radically and civilly disobedient, sought *liberation*. Perhaps through radical means—by fighting back—but liberation none the less. The early queer movements of the 1990s in the U.S. and U.K. were liberationist. Queer Nation, which was born in 1990 in New York City, organized under the slogan “Queers Bash Back,” developed a confrontational style but based it on liberation movements. The same is true for OutRage, organized in London a few weeks later. OutRage defined itself as “a broad based group of lesbians and gay men committed to radical non-violent direct action and civil disobedience to . . . affirm the rights of lesbians and gay men to sexual freedom, choice and self-determination.” SMYTH, *supra* note 20, at 17. Though certainly anti-assimilationist, these movements were liberatory and not radically separatist.

standard of obscenity on homosexual as heterosexual material.¹⁵⁶ Murdoch and Prince chronicle over eighteen cases decided on the merits—and list in an appendix over eighty cases including important certiorari denials¹⁵⁷—that dealt with homosexuality.¹⁵⁸ These included cases addressing the deportation of immigrants for homosexuality,¹⁵⁹ employment discrimination against homosexuals,¹⁶⁰ the right of teachers to advocate gay rights issues,¹⁶¹ and the use of the term “Olympics” for the Gay Olympic Games,¹⁶² as well as the more well-known recent cases involving the exclusion of a gay group from Boston’s St. Patrick’s Day Parade,¹⁶³ Colorado’s anti-gay Amendment 2,¹⁶⁴ and the Boy Scouts of America’s exclusion of gays.¹⁶⁵ Moreover, the court has addressed the issue of homosexual sodomy on several previous occasions, including *Wade v. Buchanan* in 1971,¹⁶⁶ *Wainwright v. Stone* in 1973,¹⁶⁷ *Doe v. City of Richmond* in 1976,¹⁶⁸ *New York v. Uplinger* in 1984,¹⁶⁹ and, of course,

¹⁵⁶ The Court ruled in favor of the magazine *ONE*, reversing the Ninth Circuit in a *per curiam* single-sentence opinion relying on *Roth v. United States*, which effectively applied the same standard of obscenity to homosexual as heterosexual material. See 353 U.S. 979 (1957); see generally JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE* 27-50 (2001).

¹⁵⁷ As Murdoch and Price correctly emphasize, relying on the work of H. W. Perry, the denial of certiorari is not a neutral act. See H. W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991). “[J]ustices use the *cert* process strategically to further their legal goals. In his study of the 1976–80 court terms, Perry found insiders saying without prompting that homosexuality was the one topic the court consistently ducked.” MURDOCH & PRICE, *supra* note 156, at 16-17 (citing PERRY, *supra*, at 257-258).

¹⁵⁸ See MURDOCH & PRICE, *supra* note 156, at 531-35.

¹⁵⁹ See, e.g., *Boutilier v. INS*, 387 U.S. 118 (1967); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

¹⁶⁰ See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988); *Singer v. United States Civil Serv. Comm’n*, 429 U.S. 1034 (1977).

¹⁶¹ See, e.g., *Bd. of Educ. of Oklahoma City v. Nat’l Gay Task Force*, 470 U.S. 903 (1985).

¹⁶² See *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987) (ruling against the use of the term by Gay Olympic organizers).

¹⁶³ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

¹⁶⁴ See *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁶⁵ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

¹⁶⁶ 401 U.S. 989 (1971) (vacating circuit court decision finding anti-sodomy law in Texas too broad).

¹⁶⁷ 414 U.S. 21 (1973) (reversing lower court decision finding “crime against nature” law in Florida too vague).

¹⁶⁸ 425 U.S. 901 (1976) (upholding anti-sodomy law in Virginia).

¹⁶⁹ 467 U.S. 246 (1984). *Uplinger* involved a New York statute criminalizing importuning (non-commercial solicitation) of homosexual sodomy. *Id.* at 247. The court ultimately dismissed the case as improvidently granted but only after taking cert, briefing, and oral argument. *Id.* at 249.

Bowers v. Hardwick in 1986.¹⁷⁰ Several of the justices had dealt with homosexuality cases as well before acceding to the Supreme Court. Justice Kennedy, for instance, while serving on the Ninth Circuit, had ruled in five cases involving homosexual issues and had written the decision in a case upholding Navy regulations that banned homosexuals.¹⁷¹

Moreover, the justices themselves actively partake in the culture wars, not only through their written opinions, but also and importantly through their speeches. Justice Scalia is notorious for making provocative statements in speeches. As noted earlier, he has taken the fight over homosexual sodomy beyond the courthouse. He has also made comments about other cultural conflicts, including the controversy over the Pledge of Allegiance which has caused him to recuse himself from hearing that case. Justice Scalia is very much of a cultural warrior, and he is, of course, not alone. Justices O'Connor and Ginsburg have made politically-engaged comments about the death penalty,¹⁷² and Justices Kennedy and Breyer about mandatory minimum sentencing.¹⁷³

¹⁷⁰ 478 U.S. 186 (1986).

¹⁷¹ MURDOCH & PRICE, *supra* note 156, at 378.

¹⁷² Justice O'Connor noted in a speech to the Minnesota Women Lawyers group that "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." See Fox News, *O'Connor, in Speech, Blasts Death Penalty, Lawyer Fees and Zero Tolerance*, July 3, 2001, at <http://www.foxnews.com/story/0,2933,28675,00.html>. Noting that Minnesota does not have the death penalty, O'Connor said, "You must breathe a big sigh of relief every day." *Id.* Justice Ginsburg reportedly said in a speech that "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial People who are well represented at trial do not get the death penalty." See Associated Press, *Justice Back Death Penalty Freeze*, CBS NEWS, Apr. 10, 2001, available at <http://www.cbsnews.com/stories/2001/04/10/deathpenalty/main284850.shtml>.

¹⁷³ Justice Kennedy, for instance, stated that "Our resources are misspent, our punishments too severe, our sentences too long I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In all too many cases, mandatory minimum sentences are unjust." Associated Press, *Justice Kennedy Mandatory Minimums Often Unjust*, FOX NEWS, Aug. 11, 2003, available at <http://www.foxnews.com/story/0,2933,94317,00.html>. Justice Breyer, also commenting on mandatory minimum sentences, said that:

There has to be oil in the gears. . . . There has to be room for the unusual or the exceptional case. [In many statutes] there is no room for flexibility on the downside. That is not a helpful thing to do. It's not going to advance the cause of law enforcement in my opinion and it's going to set back the cause of fairness in sentencing.

Associated Press, *Supreme Court Justice Blasts Mandatory Minimums*, FOX NEWS, Sept. 22, 2003, available at <http://www.foxnews.com/story/0,2933,97920,00.html>.

To be sure, in his dissenting opinion Justice Scalia maintains that the court only participates in the culture wars when it "depart[s] from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."¹⁷⁴ Justice Scalia contends, in the sodomy context, that finding a federal constitutional right *is* partaking in the culture war, but leaving it to the democratic process is *not*. It is not entirely clear whether Justice Scalia is being completely sincere in this respect, given that much of his dissenting opinion is turned over to arguing that *Roe v. Wade* should be overruled—in other words, given that he too, like the majority which he criticizes, is playing fast and loose with the standard of *stare decisis*. But if sincere, then Justice Scalia's argument definitely needs to be tweaked because it fundamentally misunderstands the concept of "war" and fails to appreciate that *any* decision about the rule of decision to apply in the sodomy context—whether to accept legal moralism or impose a harm principle—represents a judicial choice. In this respect, Toni Massaro is right: "The Court in *Lawrence* did step into a cultural fray, to be sure. But no matter how the Court resolved *Lawrence*, it would have been engaged in that fray"¹⁷⁵

The ultimate decision about which rule to follow is itself a choice and is never neutral. Justice Scalia misses a basic existentialist insight. *Bowers* itself was not neutral: the decision to let morality simpliciter satisfy rational basis review—without a showing of harm—is itself a loaded choice. It requires *continuing* to buy into legal moralism. It is not *dictated*. Instead it reaffirms. The same is true of adopting or reaffirming a harm principle. Requiring a showing of harm in order to satisfy rational basis review is not a neutral act. It may well be the case that, for many years, majoritarian morality was a valid basis for penal prohibition. But each time the court decided to keep it that way, the court had the option of changing the decisional rule, of inching toward a harm principle. Every time it chose not to, it *chose* not to. To suggest that the court would *not* engage in the culture war by leaving the democratic process to its own devices is blinking reality.

Moreover, in this culture war, the very rules of war are at stake. The court is not an outside observer overseeing the sex wars. The court is not a referee, because it is precisely the rules of the game that are being fought over. The rule whether there is foul play—whether a party, like the state, has overreached or gone off-sides—is up for grabs. Justice Scalia is, in effect, mixing metaphors and in the process, forgetting that this is a war, not a refereed game. The way to think about this conflict is not in terms of a

¹⁷⁴ *Lawrence v. Texas*, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting).

¹⁷⁵ Toni Massaro, *Constitutional Law as "Normal Science"*, CONST. COMMENT. (forthcoming 2004).

formal game with established rules where the court is there to make sure that the game is being played properly. The way to think about this is in war terms: there are no rules, there is no arbiter, there is no referee. And when a case is filed in federal court, the federal courts inextricably takes sides. They have no option not to participate. Dismissing the claim under Rule 12(b)(6) is no more neutral than ruling on the merits of the constitutional argument. Granting certiorari, denying certiorari—these are not neutral acts.

Next, Justice Scalia is undoubtedly right that the majority's decision in *Lawrence* is indeed shaped by the legal-professional complex within which the Supreme Court exists and operates. In claiming that the decision "is the product of a law-profession culture," Justice Scalia is making an accurate statement. In identifying the legal academy as an important institution in shaping the legal-professional complex, Justice Scalia is also right.¹⁷⁶ And in claiming that the law-profession culture "has largely signed on to the so-called homosexual agenda," Justice Scalia is, to be sure, painting with a broad brush, perhaps too broad a brush, but there is nevertheless a grain of truth in what he says. The legal-professional structure that most closely touches the Supreme Court—namely, the elite legal academy that produces not only most of the justices, but also most of their law clerks, most of the constitutional commentators, and many of the regular oral advocates—tends to be liberal, equal-rights-oriented and, at least superficially, gay friendly. But it is a far stretch from this to say that the law profession has "signed on" to the pro-gay-rights position. A more fair characterization is that, despite patches of extreme to mild homophobia, the legal profession may be slightly more tolerant of gays and lesbians than other identifiable sectors of society. It would be difficult—though fascinating—to get more precise than that and to calibrate exactly how gay-friendly the legal profession is compared to the medical profession, the psychiatric profession, the ministry, commercial bankers or accountants.

Justice Scalia is right that the Court and its members are deeply embedded in a network of institutions, social networks, practices and discourses that shape the way that they reason, deliberate and judge; the way that they write opinions and express themselves; and the way that they reproduce law clerks and lawyers. The justices themselves are the product

¹⁷⁶ Justice Scalia writes:

I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.

Lawrence, 123 S. Ct. at 2496 (Scalia, J., dissenting).

of the elite American legal academy, sporting law degrees from Harvard, Stanford, Yale, Columbia, and Northwestern.¹⁷⁷ Many of the justices were faculty members at elite law schools before acceding to the bench. Justice Scalia, for instance, was a professor at the University of Chicago, and the University of Virginia before that, and in that capacity, was himself at least indirectly associated with the American Association of Law Schools.¹⁷⁸ Justice Ginsburg was a law professor at Columbia Law School, Justice Breyer a professor at Harvard Law School, and Justice Stevens taught as well at Northwestern and the University of Chicago.¹⁷⁹ Their closest employees—their elbow clerks with whom they spend the most time—are hand-picked from an elite group of top-ranking law students from the country's elite law schools. From 1997 through 2003, Justice Scalia has hired at least six Harvard Law grads, five University of Chicago Law grads, two from Columbia, two from Notre Dame, and one each from Yale, Stanford, Boalt, New York University, Michigan, Northwestern and Penn.¹⁸⁰ Justice Scalia is certainly not alone. During the 2001 and 2002 Terms alone, the nine justices hired a combined total of seventeen Harvard law graduates, eleven Yale law graduates, nine University of Chicago law graduates, five from Columbia, three each from Stanford and New York University, and another twenty-one graduates from an assortment of elite law schools. Most of the justices are on speaking circuits that take them frequently back to law schools, and naturally they socialize with elite Washington, D.C. lawyers. Justice Scalia, for instance, is a regular at what has been called "one of Washington's most exclusive poker games," which includes the Chief Justice, William Rehnquist, and elite D.C. lawyers such as Robert S. Bennett (the personal attorney to President Bill Clinton and numerous other cabinet members, such as former defense secretary Casper

¹⁷⁷ Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer attended Harvard Law School, and Ginsburg received her law degree from Columbia; Chief Justice Rehnquist and O'Connor attended Stanford; Stevens attended Northwestern; and Thomas attended Yale. See SUPREME COURT OF THE U.S., THE JUSTICES OF THE SUPREME COURT, available at <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited March 1, 2004). For information on Stevens see Findlaw, GUIDE TO GOVERNMENT (2004), available at http://conlaw.usatoday.findlaw.com/supreme_court/justices/stevens.html.

¹⁷⁸ SUPREME COURT OF THE U.S., *supra* note 177.

¹⁷⁹ *Id.*

¹⁸⁰ Justice Scalia relies on a select group of appellate court judges to vet his clerks. Over the same period, 1997 to 2003, Justice Scalia has hired at least seven clerks of Judge Michael Luttig of the Fourth Circuit, three each from Judges O'Scannlain and Silberman, and two each from Judges Richard Posner and Sentelle. See JUDICIAL YELLOW BOOK: WHO'S WHO IN FEDERAL AND STATE COURT, VOLUMES 1997, 1998, 1999, 2000, 2001, 2002, 2003 (although some information is missing, the school affiliations of twenty-two clerks are available and reflected in text).

Weinberger) and Leonard Garment (counselor to President Richard Nixon).¹⁸¹

In addition, beginning in the early- to mid-1990s, gay and lesbian law clerks and former law clerks began coming out to their justices in part as an effort to normalize homosexual relations at the Supreme Court. Bill Araiza, law clerk to Justice Souter during the 1991-92 Term, reportedly was committed to coming out to any justice who hired him, wanting to make sure that the justice did not, reportedly in his own words, “walk away thinking he’s never met a gay person.”¹⁸² So, in spring 1992, Araiza told Justice Souter “very bluntly” that he was gay. Professor Chai Feldblum of Georgetown University, who clerked for Justice Blackmun during the 1986-87 Term, recounts coming out to Justice Blackmun in 1992, reportedly coaxing herself in the following terms: “Come on, Chai. You know he really likes you. You know it makes a difference when people know someone who’s gay. You should *do it*.”¹⁸³ According to Murdoch and Price, “Feldblum was one of a number of current and former gay clerks who by the early 1990s were coming out to justices.”¹⁸⁴ Michael Conley and J. Paul Oetken were openly gay when they clerked for Justice Blackmun in 1990-91 and 1993-94 respectively, referring openly to their respective partners as “boyfriend” or “partner.”¹⁸⁵ In fact, by 1998, Justice Blackmun included in his list of “office family” members the same-sex partners of Feldblum, Conley, Oetken and Al Lauber.¹⁸⁶ According to Murdoch and Price, “some [gay and/or lesbian clerks] have taken their partners to court reunions.”¹⁸⁷ At least one justice has had a male law clerk who has had a

¹⁸¹ See Jeffrey Rosen, *The Justice Who Came to Dinner*, N.Y. TIMES, Feb. 1, 2004, § 4 (Magazine), at 3 (discussing the exclusive poker game); D.C. BAR, LEGENDS IN LAW: A CONVERSATION WITH WILLIAM S. BENNETT, Oct./Nov. 1995, available at http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/bennett.cfm. Regarding the possible appearance of impropriety, Rosen writes:

Mr. Garment said that during the months he had a case pending before the court, he stayed away from the game. He lamented the growing concern for appearances, and insisted there is nothing wrong with litigants socializing with justices as long as they don’t discuss pending cases. “If we can’t trust justices to behave appropriately, and force them to live in a bubble,” Mr. Garment said, “we can forget about the ability of a court appropriately to reflect a changing culture.”

Rosen, *supra*, at 3.

¹⁸² MURDOCH & PRICE, *supra* note 156, at 417.

¹⁸³ *Id.* at 415.

¹⁸⁴ *Id.* at 416.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 8.

child in a same-sex relationship and has included the child among the chamber's "grand clerks."¹⁸⁸

Murdoch and Price report that, going back to the mid 1950s, "We found 22 gay former Supreme Court clerks—18 gay men and four lesbians. . . . (Another gay man and a lesbian clerked for appeals court judges who later became justices)."¹⁸⁹ However, practically all of those clerks were closeted during their clerkships, and the prevalence of closeted gay law clerks does not guarantee a gay-friendly vote—Justice Powell's notorious swing vote in *Hardwick* is testament to that. As Murdoch and Price emphasize, "[t]he impact of gay Supreme Court clerks has been very muted until very recent years because clerks tended to come out only after the justice for whom they'd worked had left the court."¹⁹⁰

The role of gay and lesbian clerks—closeted or open—may be offset by the role of more conservative chamber colleagues. The *Hardwick* case is a notorious case study. Justice Powell was the swing vote—the fifth vote that would decide the case—and originally voted for Michael Hardwick.¹⁹¹ That term, Justice Powell had four clerks: Carter Cabell Chinnis Jr., a self-identified gay man who was in the closet at the time of his clerkship,¹⁹² a graduate of Yale Law School, and now a partner in a leading law firm, Mayer, Brown, Rowe, and Maw, in Washington, D.C.; Michael Mosman, a conservative Mormon from Idaho, married at the time with three children, a graduate of Brigham Young University's law school, recently appointed by

¹⁸⁸ Informal conversation with former Supreme Court law clerk (Dec. 1, 2003).

¹⁸⁹ MURDOCH & PRICE, *supra* note 156, at 23.

¹⁹⁰ *Id.*

¹⁹¹ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 522 (1994). Laurence Tribe, lead counsel for Michael Hardwick, knew it well, stating that "if I could convince Powell, I would have five votes and possibly six [O'Connor] but . . . , if I could not, I would lose 5-4." MURDOCH & PRICE, *supra* note 156, at 286; *see generally id.* at 285-89.

¹⁹² Whether Justice Powell knew that Chinnis was gay or not is a source of much contention. *See generally* JEFFRIES, *supra* note 191, at 521-22; MURDOCH & PRICE, *supra* note 156. Justice Powell approached Chinnis on several occasions to obtain information about homosexuality despite the fact that the *Hardwick* case was assigned to Mosman. *See* JEFFRIES, *supra* note 191, at 521 (suggesting that Justice Powell had, at the very least, a subconscious appreciation that Chinnis may have had some information in that area); MURDOCH & PRICE, *supra* note 156, at 272-74. As some have suggested, though, it may have been the affinity Justice Powell felt for a fellow Virginian; and the suspicion that Mosman, a Mormon, might not be well-versed on the matters. *See id.* at 275. Justice Powell's biographer, John Jeffries asserts that Chinnis's sexual orientation was "unknown to Powell." JEFFRIES, *supra* note 191, at 521. Given that Justice Powell reportedly told Chinnis himself, to his face, that "I don't believe I've ever met a homosexual," MURDOCH & PRICE, *supra* note 156, at 273, and told his colleagues in conference on *Hardwick* that he had never known a homosexual, *see id.* at 307-08, it is hard to believe that he really knew—was fully conscious—of Chinnis's sexual orientation. *See* JEFFRIES, *supra* note 191, at 528.

President George W. Bush to the federal district court in Portland, Oregon; Anne Coughlin, a graduate of New York University School of Law, now professor of law at the University of Virginia; and William Stuntz, a graduate of the University of Virginia School of Law, now professor at Harvard Law School.¹⁹³ (Note, the knowledge/power dimensions should be obvious even to the uninitiated reader).

Justice Powell assigned the case to Michael Mosman, his more conservative, Mormon clerk. Much controversy surrounds the exact role of Mosman still today. It was in fact raised during his confirmation for federal district court in Oregon.¹⁹⁴ What is known is that Mosman wrote a twelve-page bench memo for Powell dated March 29, 1986, which Powell received on the Saturday before oral argument. In the bench memo, Mosman argued against Michael Hardwick on due process grounds: "The right to privacy calls for the greatest judicial restraint, invalidating only those laws that impinge on those values that are basic to our country," Mosman wrote.¹⁹⁵ "I do not think that this case involves any such values. I recommend reversal [of the Eleventh Circuit decision]."¹⁹⁶ "Personal sexual freedom is a newcomer among our national values," Mosman emphasized, "and may well be, as discussed earlier, a temporary national mood that fades."¹⁹⁷ On the memo in the Powell archives, a hand-written note reads: "Well written as usual. Mike would find no fundamental right."¹⁹⁸ In a memo received by Justice Powell on April 1, 1986, in response to Justice Powell's suggestion to Mosman that there may be room for protection of "homosexual relationships that resemble marriage,"¹⁹⁹ Mosman wrote to Justice Powell:

I think this is not a good approach, for several reasons [T]he kind of marriage that our society has traditionally protected is heterosexual, not homosexual. It would be bootstrapping to say that marriage is protected because of our history and tradition,

¹⁹³ See generally JEFFRIES, *supra* note 191, at 516-21; MURDOCH & PRICE, *supra* note 156, at 272-77, 292.

¹⁹⁴ See generally ALLIANCE FOR JUSTICE, INDEPENDENT JUDICIARY, at <http://www.independentjudiciary.com/nominees/nominee.cfm?NomineeID=53> (last visited Mar. 1, 2004); *Senate Confirms Mosman*, ADVOCATE, Sept. 27, 2003, available at <http://www.sodomylaws.org/usa/usnews82.htm>.

¹⁹⁵ Bench Memorandum on the *Bowers* case from Michael Mosmon to Justice Powell, at 11 (Mar. 29, 1986) (on file with author and in the Powell archives documents) [hereinafter Bench Memorandum].

¹⁹⁶ *Id.* at 12.

¹⁹⁷ *Id.* at 11; see also JEFFRIES, *supra* note 191, at 516; MURDOCH & PRICE, *supra* note 156, at 293.

¹⁹⁸ Bench Memorandum, *supra* note 195, at 1.

¹⁹⁹ This is the Memorandum from Justice Powell, to Michael Mosmon (Mar. 31, 1986) (on file with author and in the Powell archives documents).

and then add that homosexual relationships are protected because they "resemble" marriage.²⁰⁰

Justice Powell originally voted, in conference after oral argument, to affirm Judge Johnson's Eleventh Circuit decision for Michael Hardwick.²⁰¹ He based his decision at the time on the Eighth Amendment, along the lines of *Robinson v. California*.²⁰² it would be cruel and unusual to punish someone for being gay.²⁰³ The opinion writing was assigned to Justice Blackmun by Justice Stevens, with Justices Powell, Brennan, and Marshall in majority.²⁰⁴ By letter dated April 3, 1986, Chief Justice Burger lobbied Powell to change his vote, declaring that "[t]his case presents for me the most far reaching issue of those 30 years [that I have sat on the bench]."²⁰⁵ Whether influenced or not by Chief Justice Burger's letter, Justice Powell switched his vote pre-draft and joined Chief Justice Burger, who now assigned the majority opinion to Justice White.²⁰⁶ Mosman may also have had a role in convincing Justice Powell to join Justice White's opinion and minimize his concurrence.²⁰⁷ The extent of Mosman's influence on Justice Powell will never be known. What is clear, though, is that Justice Powell's actions were not the product of gay clerks or gay-leaning law schools.

Nevertheless, it is probably fair to say that, by and large, within legal academic and law profession circles, homosexuality became relatively more tolerated over the decade or decades preceding *Lawrence*—or, at the very least, that the centrists on the Supreme Court have become more gay-friendly. The decision in *Hardwick* itself was a close call—closer than we tend to think. Had Justice Powell not changed his vote, Justice White's opinion would have been the dissent. But *Lawrence* was much less of a close call. From *Hardwick* to *Lawrence*, the court composition changed significantly. Justices Rehnquist, Stevens, and O'Connor were the only justices who sat on both cases. The new justices included Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. If you stack them up

²⁰⁰ Response Memorandum from Michael Mosmon, to Justice Powell 1 (April 1, 1986) (on file with author and in the Powell archives document); see also JEFFRIES, *supra* note 191, at 524; MURDOCH & PRICE, *supra* note 156, at 304.

²⁰¹ The Eleventh Circuit decision was *Hardwick v. Bowers*, 720 F.2d 1202 (11th Cir. 1985).

²⁰² 370 U.S. 660 (1962).

²⁰³ JEFFRIES, *supra* note 191, at 520-21; MURDOCH & PRICE, *supra* note 156, at 307-08.

²⁰⁴ MURDOCH & PRICE, *supra* note 156, at 308.

²⁰⁵ JEFFRIES, *supra* note 191, at 523; MURDOCH & PRICE, *supra* note 156, at 312.

²⁰⁶ JEFFRIES, *supra* note 191, at 525; MURDOCH & PRICE, *supra* note 156, at 314.

²⁰⁷ See Memorandum from Michael Mosman, to Justice Powell (June 12, 1986) (on file with author and in the Powell archives documents); see generally MURDOCH & PRICE, *supra* note 156, at 319.

against each other, substituting relatively comparable political ideologies on homosexual sodomy, the game card would look something like the following:

<u>Hardwick</u> <u>pro-gay</u>		<u>Lawrence</u> <u>pro-gay</u>		<u>Hardwick</u> <u>pro-state</u>		<u>Lawrence</u> <u>pro-state</u>
Stevens	→	Stevens		Rehnquist	→	Rehnquist
Blackmun	→	Souter		Burger	→	Scalia
Brennan	→	Ginsburg		White	→	Thomas
Marshall	→	Breyer				
		O'Connor ²⁰⁸	←	O'Connor ²⁰⁹		
		Kennedy	←	Powell		

Hardwick may have been a close call, but *Lawrence*, it turns out, was not: a strong five-person majority with a change in vote by Justice O'Connor (on other grounds). The additional votes of Justices Kennedy and Souter—liberal replacements on this issue—made all the difference. If you eliminate the extremes at both ends of the political spectrum—Justices Stevens, Brennan, Marshall, Ginsburg and Breyer at one end, and Justices Rehnquist, Burger, White, Scalia and Thomas at the other—then the court's center has moved to the left on gay-rights issues. It was composed of Justices Blackmun, O'Connor and Powell in *Hardwick*. It is now composed of Justices O'Connor, Kennedy and Souter—clearly a more gay-friendly center court.

None of this is to suggest that the legal profession or the court is overly sensitive to gay issues. To the contrary, at every turn there are significant disadvantages in terms of contacts and opportunities. Justice Scalia, after all, is not going duck hunting with Evan Wolfson, the former director of the marriage project at Lambda.²¹⁰ And there are recurring incidents of homophobia and prejudice. This is still a court that is lead by a Chief Justice who, in 1978, "publicly compared homosexuality to a contagious disease requiring a quarantine."²¹¹ But still, it is an institutional

²⁰⁸ In *Lawrence*, O'Connor decided the case on equal protection grounds.

²⁰⁹ In *Hardwick*, O'Connor decided the case on due process grounds.

²¹⁰ The reference, of course, is to Justice Scalia's duck hunting weekend getaway with Vice President Dick Cheney in Louisiana, with free rides for himself and his daughter on Air Force Two, shortly after the Supreme Court agreed to hear a case involving the Bush administration's energy policy and task force. See Editorial, *Beyond the Duck Blind*, N.Y. TIMES, Mar. 15, 2004, at A20.

²¹¹ MURDOCH & PRICE, *supra* note 156, at 253.

and practice milieu that has come to some form of negotiated existence that tolerates and in some cases affirmatively protects the interests of gay men and lesbian women more than other social networks.

Justice Scalia's last point—that the six-member majority in *Lawrence* largely signs on to the liberal pro-gay-rights agenda, defined as the project to eliminate the moral opprobrium attached to homosexual practices—requires the most reworking. On the surface, it is right. The *Lawrence* decision is gay-friendly. Spending the night in jail and leaving the station house with a criminal arrest for a consensual intimate act is, from a gay-friendly perspective, abhorrent. Insofar as the criminal law shapes the society that we live in and distributes status, power, and wealth, the *Lawrence* decision helps to neutralize material harms to gay men and lesbian women. The consequences of criminalization and marginalization are material: homosexual partners may not get health benefits, testamentary succession rights, or an opportunity to adopt the child they are raising. As Nan Hunter emphasizes,

[s]odomy laws have functioned as the lynchpin for denial of employment, housing and custody or visitation rights; even when we have proved that there was no nexus between homosexuality and job skills or parenting ability, we have had the courts throw the 'habitual criminal' label at us as a reason to deny relief.²¹²

In this sense, gay men and lesbian women won a major battle. But in order to understand how *Lawrence* happened and what it tells us about future sex wars, it is critical to dispense with the notion of a "homosexual agenda" and to explore, instead, the proliferation of sexual projects in contemporary society, to examine the surprising alliances that form on sex matters, and to reconsider all the different interests at stake. This may lead us, in the process, to revisit exactly who won and who lost in *Lawrence*.

IV.

In the end, the politics of *spleen* may be fundamentally unstable in the criminal law context. Maybe the penal sanction, punishment, and state coercion change everything. After all, who in their right mind would want to live in fear of criminal prosecution? And even if they did, how on earth

²¹² Nan D. Hunter, *Banned in the U.S.A. What the Hardwick Ruling Will Mean*, in *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 80, 80 (Lisa Duggan & Nan D. Hunter eds., 1995). This is a common—and rightly so—refrain in the queer literature, not just the liberal pro-gay-rights literature. See, e.g., Mary Bernstein, *Gender, Queer Family Policies, and the Limits of Law*, in *QUEER FAMILIES, QUEER POLITICS*, *supra* note 34, at 420, 421 ("[T]he sodomy statutes continue to be used to justify denying employment to lesbians and gay men, removing children from lesbian mothers, and a host of other injustices. Although few people are actually arrested under the sodomy statutes, the collateral damage remains great.").

would they justify imposing that fear on others? That would be *utterly* deviant. Perhaps the politics of *spleen*, in reality, is nothing more than a coping mechanism—a way of making the best of a terrible situation. The Warsaw ghetto, some might say, may also have had positive, constitutive effects—so what? Or maybe the politics of *spleen*, by definition, simply cannot *willingly* embrace the prohibition. It may be internally incoherent to *choose* criminalization, to *will* the oppression: the transgressive impulse may not allow for the prohibition norm to be self-inflicted. In this sense, the politics of *spleen* may be unspeakable—and for that reason, unspoken.²¹³

But this leaves me with a nagging sense that the discourse of equality, of justice, of non-discrimination against gay men and lesbian women serves to render more palatable a gradual extension of the traditional heterosexual-marriage model. The surface discourse on *Lawrence* is that gays were repressed, coerced, punished for their sexual orientation, and that the larger society has now liberated gays from the oppression of the homophobic state sanction. The question is, has society instead simply made the world safe for the heterosexual-married-with-children model? Under the cover of a discourse of justice, have we not reshaped our institutions and practices in a hetero-mono mold? Instead of liberating homosexual relations, perhaps the law has figured out a better way to administer, to manage, to shape gays. Thomas Grey points in this direction in his marvelous essay, *Eros, Civilization and the Burger Court*:

For [the gay community] to be governed effectively, it must be recognized as legitimate. Perhaps something like marriage will have to be recognized for homosexual couples, not because *they* need it for their happiness (though they may), but because *society* needs it to avoid the insecurity and instability generated by the existence in its midst of a permanent and influential subculture outside the law.²¹⁴

Could that possibly be right? Some part of it? Some fraction? It is hard to know. What is clear, though, is that if it is right, then we do need to probe further, to dig deeper, to explore, again, the politics of *spleen*.

²¹³ In all my extensive research, I have not identified one academic or activist willing to advance, in writing, a gay-friendly position opposed to *Lawrence* that embraces the criminalization of homosexual sodomy.

²¹⁴ Thomas Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 97 (1980). Thanks to Mary Anne Case for pointing me to this wonderful article.

